No. 512

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IN THE

Supreme Court of the United States

JOSEPH A. ADELMAN and JOSEPH W. KENNEALY, individually and as representative of all persons in Dakota County, Minnesota owning land in the Lower Minnesota River Watershed District,

Appellants,

vs.

THE LOWER MINNESOTA RIVER WATERSHED DISTRICT,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

JURISDICTIONAL STATEMENT

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IN THE

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Appellants,

vs.

THE LOWER MINNESOTA RIVER WATERSHED DISTRICT,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MINNESOTA

JURISDICTIONAL STATEMENT

Appellants herein appeal from the final judgment of the Minnesota Supreme Court entered on June 1, 1965, reversing an order and judgment of the District Court of Dakota County, Minnesota, First Judicial District, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion and decision of the District Court of Dakota County, Minnesota, First Judicial District, is not reported. A Copy of the Findings of Fact, Conclusions of Law and Judgment of that Court are attached hereto as Appendix A. The opinion of the Minnesota Supreme Court is reported in 135 N. W. 2d 670.

JURISDICTION

This suit was brought to enjoin the Auditor of Dakota County, Minnesota, the County Commissioners of Dakota County, Minnesota and the Lower Minnesota River Watershed District from taking any further proceedings with respect to the assessments of benefits or collection or payment thereof against property of the plaintiffs in the Lower Minnesota River Watershed District. The complaint of appellants originally filed and served in the District Court of Dakota County, Minnesota alleged that M.S.A. Chapter 112 was in violation of the United States Constitution in that it deprived the appellants of their property without due process of law. The decision of the District Court of Dakota County, Minnesota was rendered on June 24, 1964 and granted appellants the injunctive relief prayed for and decided, among other things, that said M.S.A. Chapter 112 was in violation of the United States Constitution in that it deprived the appellants of their property without due process of law. Appellee herein appealed to the Minnesota Supreme Court and its assignment of error No. 2 assigned as error the finding of the Dakota County District Court that said Watershed Act is unconstitutional under the Fourteenth Amendment of the United States Constitution. The Minnesota Supreme Court, by an opinion filed on May 18, 1965 and a final judgment entered on June 1, 1965, reversed the decision and judgment of the Dakota County District Court and held in favor of the validity of M.S.A. Chapter 112 as against the challenge that it was in violation of the due process clause of the United States Constitution.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, U.S. Code,

§ 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Walker v. City of Hutchinson*, 352 U.S. 112 (1956), 77 S. Ct. 200, 1 L. Ed. 2d 178; *Chesbro v. Los Angeles County Flood Control District*, 306 U.S. 459 (1939), 83 L. Ed. 921, 59 S. Ct. 622.

The judgment and opinion of the State Court does not depend upon characterization of the statute or mere interpretation of the language employed.

The State Legislature itself did not designate the boundaries of either the Watershed District or the area to be assessed, nor did the State Legislature itself specifically declare that any land in a District to be created would be specially benefited. The Lower Minnesota River Watershed District was created by order of the Water Resources Board of the State of Minnesota pursuant to a petition filed by the Board of County Commissioners of the counties in which land of the proposed District was located. The area within the District to be assessed was determined by the Board of Managers of the District.

We do not question the power of tthe State Legislature to create the usual type of watershed or drainage districts for the customary conservation, drainage and reclamation purposes and to levy taxes and special assessments to pay the cost thereof if proper constitutional safeguards are provided. However, under the facts of the instant case, we do earnestly contest the power of the Minnesota State Legislature to permit the Lower Minnesota River Watershed District to levy special assessments against land which both abuts and does not abut on a navigable river for the benefit of commercial navigation when Congress, which has the paramount power over navigable waters, has not authorized such assessments

and when the Watershed District does not have the exclusive power, if any power, to permit abutting or non-abutting land owners to install docks and similar facilities in order to use the river which is sought to be improved.

QUESTIONS PRESENTED

1. Whether Minnesota Statutes Annotated (M.S.A.) Chapter 112, Statutes of Minnesota, is repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution insofar as it permits a Watershed District created pursuant to said Act to levy special assessments against land abutting and not abutting on a navigable river for the sole and only purpose of improving the navigability of the river when said Watershed District has not been authorized by Congress to levy such assessment and when said District has no exclusive authority to permit the use of the river or land abutting on the river for navigation purposes.

2. Whether the aforesaid statute is so arbitrary and unreasonable as to be repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution when construed and applied to permit a Watershed District to levy special assessments against certain land owners abutting and not abutting on a navigable river to pay for a project the sole purpose of which is to improve the navigability of a river, and said District wholly fails to levy special assessments against other land owners similarly situated contrary to the express provisions of the aforesaid statute.

3. Any other denial of Federal right whether or not capable in itself of being brought here by appeal.

STATUTES AND U. S. CONSTITUTIONAL PROVISIONS INVOLVED

Minnesota Statutes Annotated, Chapter 112 (and M.S.A. Chapter 106 incorporated in said Chapter 112 by reference).

Rivers and Harbors Act of 1958, Public Law 85-500 (This is an appropriation act only and is not set out in full; 33 U.S.C.A. Section 701c is the general law relating to the furnishing of part of the cost of a river improvement by a State or local agency and is set out verbatim as Appendix B).

33 U.S.C.A. Section 701c—Appendix B.

33 U.S.C.A. Section 403—Appendix C.

U.S. Constitution—Amendment 14 Section 1.

M.S.A. Chapter 112 is lengthy and we feel it would serve no useful purpose to set forth the entire statute verbatim since appellants' first contention is that said statute unconstitutionally authorizes and permits a Watershed District to levy special assessments against both abutting and non-abutting land to pay for a project the sole purpose of which is to improve navigation on a navigable river.

M.S.A. 112.36, Subdivision 2, provides in part as follows:

"* * * A Watershed District may be established for any or all of the following conservation purposes: * * * (2) improvement of stream channels for drainage, *navigation,* and any other public purpose; * * *" (Italics supplied)

The remainder of the statute relates primarily to the procedure for creating a district, establishing an overall plan and a project and the procedure for levying special assessments which are not directly involved in this case.

Likewise, setting out the statute verbatim is unnecessary with respect to appellants' second contention which relates to the arbitrary and unreasonable failure of the Watershed District to levy special assessments against certain lands which should have been assessed if the District had constitutional authority to assess appellant's lands. The section of the law applicable to this contention are as follows:

M.S.A. 112.501

"Benefited property, determination

"Subdivision 1. The appraisers shall classify the lands found to be benefited. Where the proposed improvement includes or prays for the construction or improvement of any ditch, stream, river, or watercourse, or any structures for the control or alleviation of damages from flood waters, the appraisers shall be governed by Minnesota Statutes, Section 106.151.

"Subd. 2. In all proceedings under this act assessments for benefits against lands or corporations shall be made upon benefits to such lands or corporations by reason of the project or improvement affecting the same. Benefited properties shall include:

(1) All lands or corporations, *including lands owned by the State of Minnesota or any subdivision thereof receiving direct benefits such as drainage,* commercial navigation, disposal of sewage or waste material, protection from overflow by flood control improvements, prevention of siltation, control of erosion, or maintenance of lake levels; * * *" (italics supplied)

106.151 Viewers, duties (incorporated in M.S.A. 112 by reference)

"The viewers, with or without the engineer, shall determine the benefits or damages to all lands and proper-

ties affected by the proposed drainage system and shall make their report thereon.

"* * *

"Benefits and damages shall be reported on all lands owned by the state the same as upon taxable lands. (italics supplied)

"The viewers shall report all benefits and damages that will result to all railways and other utilities, including lands and property used for railway or other utility purposes. (italics supplied)

"They shall report the benefits and damages resulting to the State of Minnesota and all counties and other municipal corporations resulting from the proposed drainage system. * * *" (italics supplied)

33 U.S.C.A. Section 701c which authorized the Corps of Engineers to improve the channel of the Minnesota River from Mile Zero to Mile 14 on condition that *some* state or local agency contribute a portion of the cost, but did not authorize the levy of special assessments or authorize abutting land owners in advance to make use of the improvement, is contained in Appendix B. The Act of Congress which prohibits an obstruction to a navigable river and makes it unlawful to build any wharf, pier, or other structure on any navigable river except with the consent of the Chief of Engineers and the Secretary of the Army is contained in Appendix C (Title 33 U.S.C. Section 403).

STATEMENT

Appellants Joseph A. Adelman and Joseph W. Kennealy are the owners of several parcels of land, some of which abut on and some of which do not immediately abut upon the south bank of the Minnesota River within fourteen miles of its mouth where it enters the Mississippi River at St. Paul, Minnesota. The record in this case showed that of 6411 acres assessed for this project, less than 1/3 thereof were abutting on the portion of the river to be improved. The Minnesota River is navigable. The two named appellants originally commenced this action on behalf of themselves and other land owners similarly situated to enjoin the collection of special assessments levied against their land by the Lower Minnesota River Watershed District to pay for said District's portion of the cost of improving the navigability of the Minnesota River from Mile Zero to Mile 14. The Lower Minnesota River Watershed District was created pursuant to Chapter 112 Minnesota Statutes Annotated entitled "Minnesota Watershed Act", originally passed in 1955. As originally adopted the purpose of the Act was to control flood waters, improve drainage, reclaiming wet lands, regulating flow of streams, conserving waters, prevent soil erosion and similar conservation purposes. By an amendment adopted in 1957 the Minnesota Legislature added the word "navigation" as one of the purposes of the Minnesota Watershed Act (1957 Minnesota Session Laws, Ch. 799).

In 1958, for the sole purpose of aiding navigation, the United States Congress adopted the Rivers and Harbors Act of 1958, Public Law 85-500, which authorized the Corps of Army Engineers to improve the navigability of the Minnesota River from Mile Zero to Mile 14. 33 U.S.C.A. Section

701c provides that such improvements shall be made on condition that *some* local governmental agency furnish certain easements and rights of way. The evidence in the case is uncontradicted that the project would have *no effect on flood control.* Neither would it affect reclamation of wet lands or any other matter whatsoever except the improvement of the Minnesota River for commercial navigation. The record was uncontradicted that the U. S. Congress and Corps of Engineers authorized the improvement primarily because there would be minimum savings of $400,000 (R. p. 322—Plaintiff's Exhibit 28 (p. 3) *annually* to existing industrial and commercial users of the river. None of appellants are included in this category and the land of appellants which does not abut on the river could not conceivably benefit. In addition, one of appellee's own witnesses estimated that one existing user of the river saves $750,000 annually by presently maintaining a 9 foot channel in this river at private expense. (R. p. 324, f. 2, 3)

The Board of Managers of the Lower Minnesota River Watershed District, by resolution, without prior notice to any land owners in the District, decided to furnish the easements and rights of way referred to in 33 U.S.C.A. Section 701c. Said Watershed District is a public corporation with limited powers relating to the conservation of waters and with none of the customary powers of municipal corporations.

The land of the appellants is located within the State of Minnesota, the County of Dakota, the Township of Eagan, and a school district, all of which public bodies have separate taxing powers in addition to whatever taxing powers may be lawfully granted to said Watershed District. The easements and rights of way which the Watershed District agreed to

furnish were an integral part of the proposed channel improvement for navigation purposes only. Prior to the commencement of this action and the preparation of the plans for the proposed improvement certain industries located on the Minnesota River below said Mile 14, to-wit: Northern States Power Company, Cargill, Inc. and several smaller industries, maintained a nine foot channel in said stretch of the Minnesota River at their own expense and primarily for their own purpose. The proposed improvement would merely eliminate several bends in the river and result in a wider and more uniform channel width for fourteen miles.

The Board of Managers of the Watershed District undertook to levy special assessments against land abutting and not abutting on the fourteen mile stretch of river to be improved for alleged special benefits to said land because of the improvement. The appellant Adelman was assessed approximately $20,000.00. Appellant Adelman was the owner of 477 acres, approximately 290 acres of which was in the assessment area. About half of said 290 acres was subject to flooding in normal high water and exceptionally high water covered all of it. Of six separate parcels assessed against Adelman, only two of them abutted on the Minnesota River. Named appellant Kennealy was the owner of 31.88 acres in the Assessment area, none of which abutted upon the Minnesota River, and for which he was assessed approximately $1,600.00. Other persons similarly situated were assessed varying amounts making a total of over $400,000.00 in assessments.

HOW THE FEDERAL QUESTION IS PRESENTED

The complaint and amended complaint of appellants originally filed and served in the District Court of Dakota County, Minnesota alleged (record in Minnesota Supreme Court, p. 2, f. 1 and p. 17, f. 2) "that said M.S.A. 112.34-112.85 is unconstitutional and void and would deprive plaintiffs of their property without due process of law contrary to the Fourteenth Amendment, Section 1 of the Constitution of the United States of America. * * *" The decision of the District Court of Dakota County, Minnesota was made on June 24, 1964, and granted appellants the injunctive relief prayed for and decided, among other things, that (record Minnesota Supreme Court, p. 463, f. 1) "* * * said M.S.A. 112.34-112.85 is unconstitutional and void and would deprive plaintiffs of their property without due process of law contrary to the Fourteenth Amendment, Section 1 of the Constitution of the United States of America. * * *" Appellee duly appealed to the Minnesota Supreme Court and its assignment of error #2 assigned as error the finding of the Dakota County District Court that said M.S.A. Chapter 112-34-112.85 is unconstitutional as follows (appellee's brief in Minnesota Supreme Court, p. 30): "The trial court erred in finding that the Watershed Act is unconstitutional under the Fourteenth Amendment of the United States Constitution. * * *" The Minnesota Supreme Court, by an opinion filed on May 18, 1965, and a final judgment entered on June 1, 1965, reversed the decision and judgment of the Dakota County District Court and held in favor of the validity of M.S.A. Chapter 112 as against the challenge that it was in violation of the due process clause of the United States Constitution.

The Trial Court found as a fact "that said Board of Managers of said Lower Minnesota River Watershed District have attempted to assess special benefits against land which receives only general benefits and no special benefits", and "that M.S.A. 112 is unconstitutional and void and would deprive plaintiffs of their property without due process of law contrary to the Fourteenth Amendment, Section 1 of the Constitution of the United States of America". That finding of the Trial Court was based on the overwhelming weight of the evidence in the case which was virtually uncontradicted. The Minnesota Supreme Court in its opinion did not attempt to disagree with the finding of fact as to general benefit, but did disagree with the trial court on its holding that the law was unconstitutional. M.S.A. Chapter 112 and M.S.A. Chapter 106 incorporated therein by reference, specifically require that railroads and the State of Minnesota should be assessed along with other private land owners if such railroads or the State owned lands within the assessment district. The evidence in the case was uncontroverted that the State of Minnesota and at least one railroad in the assessment district would receive substantial benefits in the same manner that the Watershed District claims that appellants' land would be specially benefited. R. p. 331-332 (Plaintiffs' Exhibit 2—Contract) However, neither said railroad nor the State of Minnesota was assessed for these alleged benefits, which they clearly should have been if the District is held to be constitutionally authorized to levy assessments therefor. R. p. 41-43

It is thus contended that by construing and applying the statute in question to permit the Watershed District to fail to make said assessments against a railroad right of way and the State of Minnesota is so arbitrary and unreasonable that it amounts to the taking of appellants' property without due process of law.

THE QUESTIONS ARE SUBSTANTIAL

To the best of appellants' knowledge the precise questions raised by this appeal have not been decided by this Court or any Federal Court.

The issues raised by this appeal are of the utmost importance to all owners of land abutting and not abutting on all navigable rivers. It is important for such owners or prospective owners on all navigable waterways to know whether their land can be subjected to confiscatory assessments by a state agency without authority of Congress, for an improvement which only benefits the general public and the users of the river for commercial navigation.

These issues are likewise of importance to Watershed or Drainage Districts or other public corporations located on navigable rivers, to know what kind of taxes may be levied for similar improvements.

Inherent in appellants' contention is the fact that a proposed improvement, the sole and only purpose of which is to improve the navigability of a river for commercial purposes, can result in no special benefits to abutting land owners and in no event can any special benefits result to non-abutting land owners; that a state or state agency does not have the power to levy such special assessments in any event even against abutting owners, not only because the alleged benefits resulting therefrom are general only, but also because Congress has paramount, if not exclusive control over navigable rivers and Congress only can regulate the use thereof and permit the enjoyment of the improvement. It is inconceivable that a state agency can levy special assessments for a project when it does not have the sole and exclusive right to permit the use of such improvement (except as to the

rights of the general public) as a typical municipal corporation does in the case of sewer, water, streets, etc.

Thus, we have a situation where non-abutting land owners are assessed substantial assessments for an improvement which they cannot possibly use under any circumstances (except to the same extent that the general public can use it). The abutting land owners who were assessed likewise cannot install docks or similar facilities on their abutting land without the permission of the U. S. Corps of Engineers. There is no assurance that such permission can be obtained. *Thus, even the abutting land owners are assessed for a project which the assessing authority does not have full control over as to use.* See *U. S. v. Republic Steel Corp.*, 362 U.S. 482, 4 L. Ed. 2d 903, 80 S. Ct. 884; *U. S. v. Grand River Dam Authority*, 4 L. Ed. 1186, 363 U.S. 229, 80 S. Ct. 1134.[1]

The instant case is clearly distinguished from and not in the same category as some State Court holdings where special assessments have been permitted for flood control, reclamation, wharfs etc. which obviously directly and immediately benefit abutting land. See *People ex rel Chapman v. Sacramento Drainage District*, 155 Cal. 373, 103 Pac. 207 (1919). See *Lloyd v. City of Redondo Beach*, 12 Pac. 2d 1089. Illustrative of this distinction is the case of *Chicago v. Law*, 144 Ill. 569, 33 N.E. 855, which squarely supports the contention of the appellant and which was wholly ignored by the Minnesota Supreme Court in its decision. The instant decision of

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[1]In the instant case the Watershed District was created without a petition of the land owners affected; the project in question was undertaken without mailed notice to the land owners affected; the final assessments were made on mailed and published notice. Several land owners testified they, in fact, received no notice (other than constructive published notice) of any of the proceedings, including the final assessment.

the Minnesota Supreme Court is thus in conflict with decisions of the highest Court of at least one other state on this important Federal question. See also *Myles Salt Co. v. Board of Commissioners*, 239 U.S. 478 (1916) 60 L. Ed. 392.

Even if M.S.A. Chapter 112 Is Valid, the Assessments Against Plaintiffs' Land Are in Violation of the Due Process Clause of the Federal Constitution Because the Action of the Watershed District in Levying Said Assessments Is Arbitrary and Unreasonable

M.S.A. Chapter 112 and M.S.A. Chapter 106 incorporated therein by reference, specifically require that railroads and the State of Minnesota should be assessed along with other private land owners if such railroads or the State owned land within the assessment district. The evidence in the case was uncontroverted that the State of Minnesota and at least one railroad in the assessment district would receive substantial benefits in the same manner that the Watershed District claims that appellants' land would be specially benefited. However, neither said railroad nor the State of Minnesota were assessed for these alleged benefits which they clearly should have been if the District is held to be constitutionally authorized to levy assessments therefor.

It is thus contended that construing and applying the statute in question to permit the Watershed District to fail to make said assessments against a railroad right of way and the State of Minnesota is too abritrary and unreasonable that it amounts to the taking of appellants' property without due process of law.

This Court in previous decisions has not hesitated to strike down illegal assessments in the *Myles Salt Co.* case, 239 U. S. 478 (1916), and to authorize injunctive relief for an unauthorized assessment. See *Risty v. Chicago, R. I. & Pac. R.R. Co.*, 270 U.S. 378, 70 L. Ed. 642 (1926). Likewise, in the instant case this Watershed District should not be permitted to ride roughshod over the property rights of the appellants by attempting to levy confiscatory assessments for special benefits when there can be none; and, if authorized to do so, to arbitrarily fail to assess benefits against other land owners who, under appellee's theory, admittedly receive benefits similar to those *claimed* to be conferred upon appellants.

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APPENDIX A

State of Minnesota — District Court
County of Dakota — First Judicial District

JOSEPH A. ADELMAN and JOSEPH W. KENNEALY, individually and as representatives of all persons in Dakota County, Minnesota owning land in the Lower Minnesota River Watershed District,

Plaintiffs,

vs.

CARL ONISCHUK, Dakota County Auditor; Dakota County Commissioners HENRY GACKSTETTER, LOUIS WACHTLER, JEROME AKIN, RAY DRISCOLL and JOHN SPERL, and the Lower Minnesota River Watershed District,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

The above entitled action came on for trial on the 29th day of April, 1964 before the Court, the Honorable Robert J. Breunig presiding, without a jury; Vance B. Grannis, Sr. and Vance B. Grannis, Jr. of Grannis & Grannis, South St. Paul, Minnesota appearing for the plaintiffs, except plaintiffs Myrtle G. Pahl and E. R. Amell; Thomas Ticen of Kempf and Ticen, Bloomington, Minnesota appearing for the plaintiffs Myrtle G. Pahl and E. R. Amell; Raymond A. Haik and Robert A. Minish of Erickson, Popham, Haik & Schnobrich, Minneapolis, Minnesota appearing for the defendant Lower

Minnesota River Watershed District; and Jerome J. Kluck, Dakota County Attorney, Hastings, Minnesota appearing for defendants Carl Onischuk, Auditor of Dakota County, and Louis Wachtler, Henry Gackstetter, Jerome Akin, Ray Driscoll and John Sperl, all members of the Board of Dakota County Commissioners; and the Court having duly heard and considered all of the evidence adduced at said trial or agreed to be considered, and the arguments and briefs of counsel, and being fully advised in the premises, makes the following:

FINDINGS OF FACT

I

That the plaintiffs are the owners of lands in Dakota County, Minnesota included in the purported Lower Minnesota River Watershed District.

II

That there are many persons in Dakota County, Minnesota who own land in the purported Lower Minnesota River Watershed District and said persons are too numerous so as to make it impracticable to bring them all before the court. That plaintiffs fairly represent all of said persons and bring this action on behalf of themselves and all other persons similarly situated.

III

That the defendant Carl Onischuk is the duly elected, qualified and acting Auditor of Dakota County, Minnesota. That defendants Louis Wachtler, Henry Gackstetter, Jerome Akin, Ray Driscoll and John Sperl were the duly elected, qualified and acting Commissioners of Dakota County, Minnesota at

all times herein mentioned. That the Lower Minnesota River Watershed District is a District purportedly organized pursuant to the provisions of M.S.A. 112.34-112.85.

IV

That the Lower Minnesota River Watershed District was first created pursuant to the provisions of M.S.A. 112 on or about July 17, 1956 and thereafter the organization of the District was commenced. That subsequent thereto and on or about the 19th day of November, 1957 the order of the Minnesota Water Resources Board establishing said District was vacated, set aside, nullified and held to be of no legal effect by an order of the District Court of Hennepin County, reference to which is hereby made.

V

That subsequent to November 19, 1957 the Minnesota Water Resources Board purportedly attempted to again establish and create the defendant Lower Minnesota River Watershed District pursuant to M.S.A. 112.

VI

That on August 22, 1962 the Board of Managers of the Lower Minnesota River Watershed District purported to adopt a resolution pursuant to M.S.A. 112.67-112.69 establishing a project for the improvement of the channel of the Minnesota River from Mile Zero to Mile 14.7. That said resolution also purported to be in accordance with or pursuant to the River and Harbor Act of the United States Congress of July 3, 1958 (Public Law 85-500; U.S.C.A. 33-633). That at no time did the Board of Managers of the Lower Minnesota River Watershed District, on behalf of said District, enter into a contract with the State of Minnesota or any depart-

ment thereof or the United States of America or any department thereof. That said resolution of August 22, 1962 was, therefore, not authorized by said M.S.A. 112.67-112.69 and was void and of no effect. That no petition was ever filed with the defendant Lower Minnesota River Watershed District by the affected property owners or County Board requesting the establishment of said project for the improvement of the Minnesota River channel. That in the event the defendant Lower Minnesota River Watershed District had the power to enter into a contract with the United States of America or any department thereof in connection with the improvement of the Minnesota River channel as proposed, the United States of America required that such a contract provide that said Watershed District should be obligated to:

a. Provide without cost to the United States all lands, easements, and rights of way necessary for the construction of the project and for subsequent maintenance when and as required.
b. Hold and save the United States free from damages due to the construction works.
c. Make necessary changes in roads.

That the Lower Minnesota River Watershed District does not have the power pursuant to the provisions of M.S.A. 112 to do any of the aforementioned acts or things.

VII

That on or about the 24th day of October, 1962 the Board of Managers of the Lower Minnesota River Watershed District purported to appoint appraisers in accordance with M.S.A. 112.69 to determine benefits and damages. That one of said appraisers was engaged exclusively in the building of homes, the second appraiser was engaged exclusively in community planning and development and the third was

engaged in banking. The said appraiser engaged exclusively as a community planner and developer testified that he did not feel he was qualified for this work and so advised the Board of Managers but his services were, nevertheless, retained. That said appraisers adopted an arbitrary formula for the purported benefits to land adjacent to and near the Minnesota River channel without regard to improvements on said property claimed to be benefited. The only evidence of the District adduced at the trial implementing the report of appraisers was the testimony of a witness indicating that benefits to the affected landowners would be speculative. Two expert witnesses for the plaintiffs testified that the affected plaintiffs would not be specially benefited at all. That the acts of said Lower Minnesota River Watershed District in appointing said appraisers and in confirming and ratifying the report of the appraisers is arbitrary, here capricious, unreasonable and unlawful.

VIII

That subsequent to the 10th day of September, 1963 the Board of Managers of the defendant Lower Minnesota River Watershed District purported to give notice of special assessments of purported benefits to said land within said Watershed District. That notice of said assessments as well as notices of prior hearings and proceedings in connection with the establishment and activities of said District were not given to all owners of land within said District affected by said assessments or proceedings.

IX

That the resolution of the Lower Minnesota River Watershed District dated August 22, 1962 establishing a project

for the improvement of the Minnesota River from Mile Zero to Mile 14.7 and all acts and proceedings of said District subsequent thereto are arbitrary, unreasonable, capricious, unlawful and an abusive power in that:

a. Said Watershed District at no time entered into any contract with the State of Minnesota or any department thereof or the United States of America or any department thereof at or prior to or subsequent to the adoption of said resolution.
b. Said resolution of August 22, 1962 was adopted without any petition by affected landowners or County Board therefor having been filed with said Board.
c. That said Board of Managers of said Lower Minnesota River Watershed District have attempted to assess special benefits against land which receives only general benefits and no special benefits.
d. That said proposed improvement was, in fact, created for the purpose of benefiting certain private industries and not for any purpose authorized by said chapter M.S.A. 112. That no conservation purpose or flood control will be accomplished by said proposed improvement to the Minnesota River channel.

X

That none of the land located within the Lower Minnesota River Watershed District would receive any special benefits by reason of the improvement of the Minnesota River channel as proposed by the resolution of the Board of Managers of said District adopted on August 22, 1962 and all of the land within said District as well as land located without said District, would receive general benefits by reason of said proposed project for the improvement of the Minnesota River channel. By reason thereof said M.S.A. 112.34-112.85 is unconstitutional and void and would deprive plaintiffs of their property without due process of law contrary to the Four-

teenth Amendment, Section 1 of the Constitution of the United States of America and Article I, Section 7 and Section 13 of the Constitution of the State of Minnesota.

IX

That said M.S.A. 112.34-112.85 is unconstitutional and void and is in violation of the Constitution of the State of Minnesota, Article IV, Section 27, because said law and the amendments thereto embrace more than one subject and attempt to legislate by reference to other laws.

XII

That said M.S.A. 112.34-112.85 is unconstitutional and void insofar as it attempts to provide for the assessment of benefits to plaintiffs' property without regard to cash valuation and is contrary to the Constitution of the State of Minnesota, Article IX, Section 1.

XIII

That said M.S.A. 112.34-112.85 is so vague, ambiguous, discriminatory and inconsistent that it is incapable of any reasonable interpretation or enforcement.

XIV

That plaintiffs have no adequate remedy at law and have suffered and will suffer irreparable injury unless the defendants are restrained as prayed for in the complaint.

CONCLUSIONS OF LAW

I

That the resolution of the Lower Minnesota River Watershed District, dated August 22, 1962, purporting to establish

a project for the improvement of the Minnesota River from Mile Zero to Mile 14.7 should be and it is hereby vacated, set aside and nullified and held to be of no legal effect.

II

That the Lower Minnesota River Watershed District has no legal existence and is without the power and right to exercise any of the functions purported to have been conferred upon it by the order of the Minnesota Water Resources Board of March 23, 1960.

III

That the plaintiffs are entitled to a permanent injunction permanently enjoining and restraining the defendants, and each of them, their agents, servants and employees, from doing any act or thing in connection with the levy, collection or enforcement of any special assessments for purported special benefits to any land in Dakota County, Minnesota within the Lower Minnesota River Watershed District; from transferring any funds to the treasurer of the Lower Minnesota River Watershed District which are now on hand or will be hereafter received from the sale of bonds, assessments or otherwise in accordance with the provisions of M.S.A. 112.60, subdivision 3.

From taking any further proceedings with respect to the improvement of the Lower Minnesota River Watershed District.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated at Hastings, Minnesota this 24th day of June, 1964.

ROBERT J. BREUNIG
Judge of the District Court

Stay of 30 days is entered.

APPENDIX B

§ 701c. Rights-of-way, easements, etc.; acquisition by local authorities; maintenance and operation; protection of United States from liability for damages; requisites to run-off and water-flow retardation and soil erosion prevention assistance.

After June 22, 1936, no money appropriated under authority of section 701f of this title shall be expended on the construction of any project until States, political subdivisions thereof, or other responsible local agencies have given assurances satisfactory to the Secretary of the Army that they will (a) provide without cost to the United States all lands, easements, and rights-of-way necessary for the construction of the project, except as otherwise provided herein; (b) hold and save the United States free from damages due to the construction works; (c) maintain and operate all the works after completion in accordance with regulations prescribed by the Secretary of the Army: *Provided,* That the construction of any dam authorized by section 5 of the Act of June 22, 1936, c. 688, 49 Stat. 1572, may be undertaken without delay when the dam site has been acquired and the assurances prescribed herein have been furnished, without awaiting the acquisition of the easements and rights-of-way required for the reservoir area: *And provided further,* That whenever expenditures for lands, easements, and rights-of-way by States, political subdivisions thereof, or responsible local agencies for any individual project or useful part thereof shall have exceeded the present estimated construction cost therefor, the local agency concerned may be reimbursed one-half of its

excess expenditures over said estimated construction cost: *And provided further,* That when benefits of any project or useful part thereof accrue to lands and property outside of the State in which said project or part thereof is located, the Secretary of the Army with the consent of the State wherein the same are located may acquire the necessary lands, easements, and rights-of-way for said project or part thereof after he has received from the States, political subdivisions thereof, or responsible local agencies benefited the present estimated cost of said lands, easements, and rights-of-way, less one-half the amount by which the estimated cost of these lands, easements and rights-of-way exceeds the estimated construction cost corresponding thereto: *And provided further,* That the Secretary of the Army shall determine the proportion of the present estimated cost of said lands, easements, and rights-of-way that each State, political subdivision thereof, or responsible local agency should contribute in consideration for the benefits to be received by such agencies: *And provided further,* That whenever not less than 75 per centum of the benefits as estimated by the Secretary of the Army of any project or useful part thereof accrue to lands and property outside of the State in which said project or part thereof is located, provision (c) of this section shall not apply thereto; nothing herein shall impair or abridge the powers now existing in the Department of the Army with respect to navigable streams: *And provided further,* That nothing herein shall be construed to interfere with the completion of any reservoir or flood control work authorized by the Congress and now under way.

APPENDIX C

§ 403. Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same. Mar. 3, 1899, c. 425, § 10, 30 Stat. 1151.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 512

JOSEPH A. ADELMAN and JOSEPH W. KENNEALY, individually and as representative of all persons in Dakota County, Minnesota owning land in the Lower Minnesota River Watershed District,

Appellants,

vs.

THE LOWER MINNESOTA RIVER WATERSHED DISTRICT,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

MOTION TO DISMISS OR AFFIRM

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IN THE

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OCTOBER TERM, 1965

No. 512

JOSEPH A. ADELMAN and JOSEPH W. KENNEALY, individually and as representative of all persons in Dakota County, Minnesota owning land in the Lower Minnesota River Watershed District,

Appellants,

vs.

THE LOWER MINNESOTA RIVER WATERSHED DISTRICT,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to dismiss this appeal and to affirm the final judgment of the Supreme Court of the State of Minnesota on the grounds that the appeal is not within the jurisdiction of this Court because it was not taken in conformity to the Rules, that the judgment rests on an adequate non-federal basis, and that the appeal does not present a substantial federal question.

OPINIONS BELOW

The District Court of Dakota County, Minnesota, did not render an opinion in this case; the Findings of Fact, Conclusions of Law and Order for Judgment entered by that court, which are not reported, are printed in appellants' Jurisdictional Statement (App. A). The opinion of the Minnesota Supreme Court is reported as *Adelman v. Onischuk,* 135 N.W.2d 670 (Minn. 1965). This opinion was not printed in the Jurisdictional Statement, but it is printed in Appendix A hereto, *infra,* page 13. An opinion of the District Court of Scott County, Minnesota, *Kelmar Corp. v. Lower Minnesota River Watershed District,* which the Minnesota Supreme Court made dispositive of all charges of unconstitutionality of the statute involved herein is unreported and is printed in the Record (435-57) and in Appendix B, *infra*, page 34.

JURISDICTION

This appeal is not within the jurisdiction of this court because it was not taken in conformity with the Revised Rules of the Supreme Court of the United States. Rule 13(2) requires the appellant to file "a printed statement as to jurisdiction, which shall comply in all respects with Rule 15." Rule 15(1)(a)(h) requires a copy of the opinion of the Minnesota Supreme Court and a copy of the judgment appealed from to be appended to the jurisdictional statement. Rule 15(1)(b)(v) requires the appellants to attach the verbatim text of the Watershed Act, the statute involved in this appeal, as an appendix. Appellants' jurisdictional statement fails to comply with these requirements and the appeal is subject to dismissal under Rule 16(a).

STATUTES INVOLVED

The statute involved is the Minnesota Watershed Act, 1 *Minnesota Statutes*, c. 112, p. 1151 (1961). This was not printed in the Jurisdictional Statement, but is printed in Appendix C hereto, *infra*, page 56.

STATEMENT

Appellants by this appeal are seeking review of a decision of the Minnesota Supreme Court denying them injunctive relief against a project to deepen the Minnesota River channel from its confluence with the Mississippi River to a point 14.7 miles upstream. The project was undertaken by appellee, the Lower Minnesota River Watershed District (hereinafter "District"), in cooperation with the Corps of Army Engineers of the United States Government. Construction of the channel at an estimated cost of three million dollars would be performed by the federal government with the lands, easements, and other required items of local cooperation furnished by the District at a cost of $414,000.00.

The United States Congress authorized this project by the Rivers and Harbors Act, §101, 72 Stat. 297, 298 (1958). The District, acting pursuant to authority contained in *Minnesota Statutes* §§ 112.67-69 and 112.43(2)(9) 1961), agreed to provide the items of local cooperation required as a condition of construction by the federal government. 49 Stat. 1571 (1936), as amended, 33 U.S.C. §701(c).

Prior to cooperating with the federal government to undertake the project, the District, on June 12, 1962, held a hearing to determine whether the project was in the public interest and whether the District should agree to provide the items of local responsibility required by the federal government. Notice of this hearing, by mail and publication, was given to owners of land liable to be assessed for these

local costs (136:1;* Exhibits 9, 10, 11 and 98). The notice stated that "the cost of providing the local assurances will be paid by assessment against benefited property within the District" (Exs. 2 and 78).

At the hearing the owners were informed that the items of local cooperation required by the federal project would cost approximately $500,000.00 and that this amount would be assessed against the property benefited by the project (143:1). Landowners who supported or opposed the project and their attorneys were heard as to the need for the project. Based on the evidence presented at this hearing, the District adopted a resolution on August 22, 1962, ordering the improvement and agreeing to provide the items of local cooperation required by the federal government (143; 144; Exs. 2, 79 and 98). On September 13, 1962, the federal government accepted the resolution of August 22, 1962, as the binding obligation of the District to provide the items of local cooperation (296; Ex. 3).

No appeals, pursuant to *Minnesota Statutes* §112.791 (1961), were taken from the order of the District establishing the project (145:1). On October 24, 1962, after the time for appeal had expired, the District appointed three appraisers to determine the benefits and damages to lands affected by the project (145:3; 149:1). The appraisers developed a system of land classification and assessed all lands within each classification equally, regardless of present use (39:3; 40; 49:1, 2; 149:3; 157; 178:2, 3). The benefits found by the appraisers substantially exceeded the amount of damages (46:2; 310:3; 311:2, 3; 312).

Upon filing of the appraisers' report the District, on September 10, 1963, held a hearing to consider confirmation of the report. Notice of this hearing was mailed to owners of

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*Figures in parentheses refer to page and folio numbers of Record.

land subject to assessment (154:3; 241:3; Ex. 6). Personal service of this notice was made on owners whose land was to be taken by condemnation (Ex. 7). In addition, notice was published in the counties where lands affected by the project were located (Ex. 5). On September 12, 1962, the managers of the District corrected certain computation errors and thereafter confirmed the appraisers' report (158: 1, 2).

Appellants received notice of both hearings. Appellant Joseph W. Kennealy received notice by mail of the project hearing on June 12, 1962 (Ex. 9), and of the assessment hearing on September 10, 1963 (Ex. 6). His name and the legal description on his assessed land was published in the Dakota County Tribune (Ex. 5). Appellant Joseph Adelman received mailed notice of both the project hearing (Ex. 9), and the assessment hearing (Ex. 8), and was personally served with notice of the assessment hearing (Ex. 7). He was named and his assessed lands were described in the published notices (Ex. 5). Appellant Adelman admitted receipt of the notices and that he had knowledge of the project (241: 3 – 242:1). He was represented by counsel at all times and his attorney appeared at the hearing on September 10, 1962 (Ex. 97). He also appealed as provided in the Watershed Act, section 112.80, to review the amount of damages awarded for his property as well as the amount of his assessment (239:3 – 241:2, 3). This appeal was pending at the time the present action was commenced.

On October 10, 1962, prior to the assessment of any land, a temporary restraining order preventing the managers from proceeding with the project was secured upon the ground that the Watershed Act and the action taken by the District was unconstitutional (159:3; 160:1). The opinion of the Scott County District Court in *Kelmar Corp. v. Lower Minnesota River Watershed District*, which upheld the consti-

tutionality of the Watershed Act and the procedures followed by the District is printed as Appendix B, *infra*, page 34.

On November 27, 1962, the managers of the District filed the appraisers' report with the auditors of Hennepin, Scott and Dakota Counties (160:3; 161:3) who proceeded to levy the assessments and collect the local costs (343:3; Ex. 87). Thereafter, the District received in excess of $190,000, which included all assessments due from Hennepin and Scott Counties and in excess of $65,000.00 from Dakota County (161:3; 162:1; 345:1).

After the project had been approved and authorized, the benefits and damages determined, assessments levied and paid, and after $115,000.00 had been expended on the project (162:3; 163:2; 394:2, 3; 395:1; 411), appellants sued to enjoin further work on the project and the transfer to the District of the remaining funds to be paid from the assessments against Dakota County lands.

The District Court of Dakota County entered an order finding favorably to appellants on every issue raised by them. (Jurisdictional Statement, App. A.) On appeal, the Minnesota Supreme Court reversed, holding that appellants had adequate legal remedies under the Watershed Act, as well as under *Minnesota Statutes* §278.01 (1961)[1] that barred their equitable action for an injunction.

---

[1] 278.01 DEFENSE OR OBJECTION TO TAX ON LAND; SERVICE AND FILING. Any person having any estate, right, title, or interest in or lien upon any parcel of land, who claims that such property has been partially, unfairly, or unequally assessed, or that such parcel has been assessed at a valuation greater than its real or actual value, or that the tax levied against the same is illegal, in whole or in part, or has been paid, or that the property is exempt from the tax so levied, may have the validity of his claim, defense, or objection determined by the district court of the county in which the tax is levied by serving copies of a petition for such determination upon the county auditor, county treasurer, and the county attorney and filing the same, with proof of such service, in the office of the clerk of the district court on or before the first day of June of the year in which such tax becomes payable.

ARGUMENT

The Judgment Rests on an Adequate Non-Federal Basis.

This appeal must be dismissed and the judgment of the state court affirmed because the judgment appealed from rests on an adequate non-federal basis. *Murdock v. Memphis,* 87 U.S. (20 Wall.) 590 (1875). This Court will accept as binding upon it the state court's decision of questions of state law. *Ibid.* The Minnesota Supreme Court denied injunctive relief upon the ground that appellants had adequate legal remedies available under the Watershed Act, §112.80, and under *Minnesota Statutes* §278.01 (1961), which they failed to exercise. 135 N.W.2d 678-79, Appendix A, *infra,* page 13.

Appellants ignored several opportunities to challenge the validity of the Watershed Act. First, appellants failed to appeal under section 112.792, from the order entered on March 23, 1960, establishing the Lower Minnesota River Watershed District.

On September 15, 1961, the Minnesota Water Resources Board confirmed the District's over-all plan which included the present project to improve the Minnesota River channel from Mile Zero to Mile 14.7. No appeals to object to this project were taken as provided by section 112.792.

Another opportunity for review occurred on August 22, 1962, when the District ordered the channel improvement, even though mailed and published notice of the project hearing was given to owners of land subject to assessment (136; 137; 138).

The fourth opportunity was from the Manager's order confirming the assessment report. The assessment hearing followed mailed and published notice and personal service on the owners of affected lands (154; 3; 155; 156). Within 30 days of the September 12, 1963, order, appellant Adelman

appealed under the Watershed Act to the district court contesting the amount of his assessment and the adequacy of his condemnation award. In addition, an action questioning the constitutionality of the statute and the procedures followed by the District was commenced in the District Court of Scott County (159). Although the District had a right of entry under *Minnesota Statutes* §112.69(3), it delayed expenditures and any assessments until a decision on the constitutionality of the Watershed Act was reached. The Scott County District Court sustained the actions of the managers and held the Act to be constitutional (App. B). No appeal was taken from this decision.

An additional right of review was available to appellants under *Minnesota Statutes* §278.01. *Larson v. Freeborn County*, 267 Minn. 383, 126 N.W.2d 771 (1964), holds that this effective and direct remedy is available to taxpayers who wish to contest the validity of an assessment proceeding and precludes their right to equitable relief.

Because appellants ignored these remedies, they were held to be barred from challenging the constitutionality of the Watershed Act in this action. As Mr. Justice Cardozo stated in *Utley v. City of St. Petersburg*, 292 U.S. 106, 109-10 (1934), "This court will not listen to an objection that the charge has been laid in an arbitrary manner when an administrative remedy for the correction of defects or inequalities has been given by the statute and ignored by the objector." Since the decision of the federal question was not necessary in light of the Minnesota Supreme Court's disposition of the case on this non-federal basis, there can be no review by this Court. *Utley v. City of St. Petersburg*, *supra*, at 111.

There Is No Substantial Federal Question Involved.

Appellants' mere assertion that they are denied due process of law because their lands will not benefit from the project does not present a substantial federal question.

The requirement of due process as announced in *Walker v. Hutchinson,* 352 U.S. 112, 115 (1956), is "that an owner whose property is taken for public use must be given a hearing in determining just compensation." This notice must be reasonably calculated to inform parties of the pendency of the proceedings and afford them an opportunity to present their objections. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950).

Appellants were given both mailed and published notice of their assessments as required by *Minnesota Statutes* §§ 112.35, subd. 20; 112.69, subd. 2 (1961). In addition, appellants were given mailed and published notice of the hearing on the establishment of the project (136:1 – 138; Exs. 8, 9 and 10), and personal service of notice was made on owners whose lands were to be condemned by the District (Exs. 4, 5, 6, 7 and 8).

These notices and opportunities for landowners to contest the assessments satisfied all the requirements of due process. Where provision is made "for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law." *Paulsen v. City of Portland,* 149 U.S. 30, 41 (1893); *accord, Chicago, M. St. P. & P. R. R. v. Risty,* 276 U.S. 567, 574 (1928).

While a special assessment can only be levied to the extent that land is specially benefited by an improvement, "unless such assessment is arbitrary and unreasonable, the extent of the benefit essential to justify the assessment * * *

[is] a matter within the control of the local authorities." *Mount St. Mary's Cemetery Ass'n v. Mullins,* 248 U.S. 501, 505 (1919); see also *Louisville & N. R. R. v. Barber,* 197 U.S. 430 (1905). The record shows that appellants' lands would increase in value as a result of the improvement project (46:3; 53:1; 310:3; 311:2; 322:1), and that the increase would exceed the benefits assessed (312:2; 332:3; 333:1).

Appellants, in their assertion that they were denied due process of law, ignore the procedural requirements of the Watershed Act by stating: "the remainder of the statute relates primarily to the procedure for creating a district, establishing an over-all plan and a project and the procedure for levying special assessments which are not directly involved in this case" (Jurisdictional Statement, p. 5). This assertion, when read with appellants' unsupported allegations that "The Board of Managers * * * without prior notice to any landowners in the District, decided to furnish the easements and rights of way" (*Id.* at p. 9), and that "the project in question was undertaken without mailed notice to the landowners affected" (*Id.* at p. 14, n. 1), does not correctly reflect the record.

The State Has Concurrent Jurisdiction Over the Minnesota River.

Appellants contest the power of the State of Minnesota to delegate to a municipal corporation the power to levy special assessments for a cooperative navigation project upon the basis that Congress has not authorized such assessments (Jurisdictional Statement, pp. 3, 5). This argument cannot be the basis of review by this Court. The Minnesota River lies entirely within the State of Minnesota, "and the authority of the state over it is plenary, subject only to such action as Congress may take in execution of its power under the Constitution to regulate commerce among the several states."

Cummings v. City of Chicago, 188 U.S. 410, 427 (1903); *Wilson v. Black Bird Creek Marsh Co.,* 27 U.S. (2 Pet.) 245 (1829). In the instant case, Congress specifically required local cooperation, such as that furnished by the District, as a condition of federal construction of the channel improvement.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this appeal should be dismissed and that the judgment and decree of the Minnesota Supreme Court be affirmed.

Respectfully submitted,

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APPENDIX A

No. 1 Dakota County Nelson, J.
Concurring specially,
Otis, J.

Joseph A. Adelman and Joseph W. Kennealy, individually and as representatives of all persons in Dakota County, Minnesota, owning land in the Lower Minnesota River Watershed District,

Respondents,

39569 & 39608 vs.

Carl Onischuk, Dakota County Auditor, et al.,

Respondents,

and

Lower Minnesota River Watershed District,

Appellant.

(Endorsed, Filed May 18, 1965. Mae Sherman, Clerk, Minnesota Supreme Court.)

SYLLABUS

1. Relief against erroneous, illegal or excessive assessments will not be granted by a court of equity if the property owner has an adequate remedy at law. If the statute provides a remedy by appeal, such remedy is generally exclusive and will preclude any resort to equity.

2. The Minnesota Watershed Act provides the landowner with the right to contest the amount of damages awarded and the amount of an assessment by appeal to the district court. Since all issues raised in this action are, or could

have been, raised by appeals authorized by that statute, the present equitable action for an injunction does not lie.

3. Minn. St. 278.01 to 278.05 constitute a review statute enacted by the legislature in order to provide adequate, speedy relief to taxpayers challenging an assessment against their property and provided another adequate legal remedy in the instant case.

4. An action to enjoin a watershed district from proceeding with an improvement project and to enjoin county officials from transferring funds to the district is not a class action under Rule 23.01, Rules of Civil Procedure.

5. In the absence of flagrant abuse or purely arbitrary action the legislature consistently with both the State and Federal Constitutions may provide for establishment of local watershed districts to include real property which will be specially benefited by drainage, flood control, or other improvements therein and may also provide that such districts, in order to acquire, construct, maintain, and operate such improvements, may impose special tax burdens upon the lands benefited.

6. In determining whether land is benefited, it may constitutionally be considered simply in its general relations and apart from its particular use.

Reversed with directions.

OPINION

NELSON, Justice.

Appeals from an order and the judgment entered pursuant thereto enjoining the Lower Minnesota Watershed District (hereinafter referred to as the District) from proceeding further in carrying out a planned improvement of a portion of the Minnesota River.[1]

Plaintiffs commenced this action on February 21, 1964, contending that the Minnesota Watershed Act, Minn. St. c. 112, was unconstitutional and seeking an injunction permanently enjoining the District from proceeding with a project to improve the Minnesota River channel. The action also sought to enjoin the Dakota County auditor and commissioners from transferring funds to the treasurer of the District. The District filed a cross-claim against the Board of County Commissioners and the county auditor of Dakota County asking that they be ordered to pay its funds to meet Dakota County's share of the total cost of the channel-improvement project.

The order and judgment appealed from declared the statute to be unconstitutional, and the District to have no legal existence, and granted the injunctive relief requested. The relief sought by the District on appeal is a reversal of the order and judgment with directions to enter findings and judgment that the Minnesota Watershed Act is constitutional, that the District is authorized to proceed with the improvement project, and that the Dakota County board and

---

[1]The judgment was entered after the notice of appeal from the order and the bond for costs had been filed although filing of the bond had the effect of suspending the right to enter judgment while the appeal from the order was pending. See, Minn. St. 605.10, 605.11, subd. 6; Rule 62.04, Rules of Civil Procedure; St. Paul & Duluth R. Co. v. Village of Hinckley, 53 Minn. 102, 54 N.W. 940. However, both appeals involve the same issues.

auditor should pay to the treasurer of the District the balance of the funds due for the channel-improvement project.

It is clear that the primary purpose in the establishment of the District is to improve the navigability of the lower Minnesota River and that the immediate benefactors of such improvement would be those industrial corporations which currently use the river for commercial navigation. These corporations now must employ dredging firms to maintain stretches of the river, which are otherwise too shallow for commercial vessels, at proper depths. If the improvement is carried out as planned, those now using the channel for industrial purposes will be relieved of that burden since the United States Government has indicated that it will maintain the river once the initial improvement is made.

The Minnesota Watershed Act was enacted in 1955 to permit the development of an integrated program for the use of water. The legislature broadly declared the purpose of the act to be "the protection of the public health and welfare and the provident use of the natural resources" of the state. Minn. St. 112.34, subd. 1.

Section 112.36 of the act provides that a watershed district may be established by the Minnesota Water Resources Board for any or all of several purposes, including (1) control or alleviation of damage by flood waters; (2) improvement of stream channels for drainage, navigation, or any other public purpose; (3) regulating the flow of streams and conserving the waters thereof; (4) diverting or changing watercourses in whole or in part; and (5) providing and conserving water supply for domestic, industrial, recreational or other public use.

It is clear from the foregoing that the act provides for the establishment of multiple-purpose watershed districts in order to develop and manage uniform and integrated pro-

grams of water use in separate areas. The first step in establishing a watershed district is the filing of a nominating petition signed by at least one-quarter of the freeholders of the proposed district or, alternatively, a petition from at least one-half of the counties in the proposed district. §112.37. The Water Resources Board must then review the merits of the proposal at a public meeting, after which it may either approve or disapprove. §§ 112.38, 112.39. Should the Water Resources Board approve the establishment of the district, it is then required to appoint a board of managers who will become responsible for the administration of the district. §§ 112.39, 112.43.

The managers are to develop an over-all plan, make it known to local governmental units, and present it for review to the Water Resources Board at another public hearing. §112.46. Thereafter any projects to implement the plan must be proposed by a petition. §112.48. However, improvements financed by either the Federal or state government need not be initiated by petition. §112.69, subd. 2.

When such a petition is filed, the managers are required to obtain necessary surveys and plans for construction of the proposed improvement and an engineer's report concerning it. §112.49. They also appoint appraisers who determine the benefits or damages to lands affected by the proposed improvement. §112.50. The managers can order construction only after a public hearing. §112.54. The act provides for notice of such hearings by publication and also by mail to persons affected by a particular project. §112.53.

The board of managers has the powers necessary to deal with problems of water use. To permit Federal participation in local watershed projects, the managers may cooperate or contract with any Federal agency. They may also acquire by purchase, gift, or by eminent domain, any necessary per-

sonal or real property and may contract for any construction project authorized under the act. §112.43.

The act provides how an aggrieved taxpayer may obtain judicial review of actions taken thereunder. He may obtain review of decisions by the Water Resources Board establishing a district or confirming an over-all plan in the district court of a county in which part of the watershed district is situated. §112.792. If a board of managers authorizes a project, the taxpayer may appeal to the Water Resources Board and may obtain review of its decision in the district court. §§ 112.791, 112.792. Any confirmation of an appraisers' report may be challenged by a taxpayer through a direct appeal to the district court to review the amounts of benefits or damages determined. §112.80, subd. 1.

The record shows that the first attempt by the Water Resources Board to establish a watershed district for the lower Minnesota River was held void in 1958 by the District Court of Hennepin County for failure to give proper notice of the hearing set for the purpose of establishing a district. Legislative acts followed amending the Minnesota Watershed Act to assure landowners sufficient notice of hearings of the Water Resources Board for consideration of nominating petitions and of the hearings of the board of managers in a particular watershed district. L. 1959, cc. 240, 241, 245, 246; L. 1961, c. 601, §§ 13 and 14. Thereafter the county boards of Hennepin, Scott, Ramsey, Dakota and Carver Counties petitioned the Water Resources Board to create the District, and the Water Resources Board considered the several petitions on December 16, 1959. Notice of that meeting was published in legal newspapers in all counties in the proposed district on November 26 and December 3, 1959. Notice of the hearing was also mailed to the county auditor of each county affected and to the chief executive officer of the affected mu-

nicipalities. No objectors to the proposed district appeared at the meeting and by an order dated March 23, 1960, the Water Resources Board ordered the creation of the District and appointed its first Board of Managers. Although a right of appeal to the district court was provided to any person aggrieved by the order establishing the District under §112.792, no appeal was taken by anyone.

In 1960 the Board of Managers retained an engineer to prepare an over-all plan for the projects in the District. After contacting political subdivisions, property owners and industry, the engineer prepared and submitted the over-all plan to the Board of Managers, who thoroughly reviewed it and then presented it to the Water Resources Board in the summer of 1961. A hearing on the over-all plan was held by the Water Resources Board on September 15, 1961, notice of which was mailed to all political subdivisions in the District and published in a newspaper in each county in the District.

Evidence concerning the problems facing the District—navigation, flooding, sedimentation, soil conservation, water supply, and mosquito control—was presented at the meeting. The Water Resources Board after consideration of the evidence approved the over-all plan and ordered its adoption. This over-all plan provided for a variety of projects including the one here involved, which calls for straightening and dredging a 9-foot-deep, 100-foot-wide channel in a 14-mile portion of the river.

The plan provided that the construction of the channel would be performed by the Federal government at an estimated cost of nearly $3,000,000 which it was to bear. The United States Congress authorized this construction in the River and Harbor Act of July 3, 1958, 72 Stat. 297. That act requires the local governmental body to supply without cost

to the United States government the lands, easements and rights-of-way necessary for the construction of the channel, including any necessary changes in roads, and in addition to hold the United States free from damages due to construction. No one sought review, pursuant to §112.792, of the order approving the plan.

The Board of Managers of the District scheduled a public hearing for June 12, 1962, to determine whether the channel improvement was in the public interest and, if so, whether the District should provide the items of local cooperation required by the Federal government. These items were set forth in the notice of hearing, which also stated: "The cost of providing the local assurances will be paid by assessment against benefited property within the district."

The Board of Managers gave notice of the hearing to the landowners by mail, including every property holder of record. The names of those receiving mailed notice were taken from the tax records of the District. If the board was unable to locate particular landowners, local newspapers published that fact. The record indicates that about 100 persons attended the meeting. Maps of the project were displayed, explained by the District engineer, and discussed at the meeting. Evidence was presented to the Board of Managers about the project by persons of varied interests. At least three persons objecting to it appeared before the board. Those present were informed that local cooperation would be necessary and that up to $500,000 would be required from the District and would be assessed against the property owners in the area. Efforts were made by the board to acquaint everyone present with the purpose of the meeting and with the channel-improvement project.

On August 22, 1962, the Board of Managers reviewed the evidence presented at the June 12 meeting and on the basis of the evidence presented adopted a resolution by which it

ordered the project and undertook to provide the items of local cooperation required by the Federal government. Although an appeal to the Water Resources Board from the order of the managers authorizing the project was explicitly made available by §112.791, no appeals were taken contesting the authority of the District to undertake the channel project as ordered by the Board of Managers, nor was the constitutionality of the act challenged under any form of appeal relief made available by the Watershed Act.

On September 13, 1962, the Corps of United States Army Engineers accepted the August 22, 1962, resolution as the binding obligation of the District to provide the items of local cooperation. The letter of acceptance, however, contained a qualification as to the obligation of the United States to proceed if funds should not be available.

At the hearing of June 12, 1962, the Board of Managers of the District received a request from landowners, including industrial owners interested in the project, that the board receive recommendations on the appointment of appraisers and methods of appraisal. The board thereafter sought and considered such recommendations and attempted also to inform local governmental units of the District's progress on the project. An appraisal manual was prepared to acquaint landowners with the method of assessment to be followed. On October 24, 1962, the Board of Managers appointed three appraisers to determine the benefits and damages to lands within the area. In studying the problems encountered in appraising land within the area, the appraisers used detailed maps, aerial photographs, project plans, and surveys to supplement their actual inspection of the lands. They developed a system of land classification based upon an area formula and assessed all lands within each classification equally, re-

gardless of present use and without regard to cash valuation.[2]

The appraisers filed their report on June 12, 1963, which showed the benefits found to substantially exceed the amount of damages. Pursuant to §112.69, subd. 2, the Board of Managers held a public hearing to consider confirmation of the appraisers' report September 10, 1963. Notice was mailed to the landowners pursuant to §112.53, subd. 2. The Board of Managers served personally all owners of land to be condemned with notice of the hearing and in addition published a notice of the hearing which contained a legal description of the lands affected and the names of the owners. It is clear that notice of the September 10 hearing was received by the landowners who brought and who support the action involved on this appeal.

At the hearing objections to the report were raised and the landowners were informed as to the method of assessment. All landowners were given an opportunity to be heard. On September 12, the Board of Managers corrected various computation errors in the report and then approved it.

On the last day to appeal from the order confirming the appraisers' report, the Kelmar Corporation, a landowner assessed for the project, obtained a temporary restraining order in the District Court of Scott County enjoining the Board of Managers from filing the report with the auditors of Hennepin, Scott, and Dakota counties and brought an action alleging that the Watershed Act was unconstitutional; that the District lacked authority to establish the project; that

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[2]Minn. Const. art. 9, §1, provides in part:

"* * * Taxes shall be uniform upon the same class of subjects, and shall be levied and collected for public purposes, * * *.

"Provided, that the legislature may authorize municipal corporations to levy and collect assessments for local improvements upon property benefited thereby without regard to cash valuation * * *."

the appraisers had used an arbitrary formula in assessing the benefits; that there was no special benefit resulting from the project; and that necessary rights-of-way had not been condemned. After a hearing a temporary injunction was denied by the district court in an order issued November 26, 1963, the restraining order dissolved, and the appeal dismissed as to all issues except the amount of benefits assessed or the amount of damages awarded. No appeal has ever been taken from that order and the Scott County District Court's disposition of all charges of unconstitutionality alleged in that proceeding stands.

Following the decision in the Kelmar appeal, pursuant to §§ 112.60 and 112.69, subd. 2, the Board of Managers filed the appraisers' report with the county auditors of Hennepin, Scott and Dakota counties, listing assessments aggregating $414,402.75.

The auditors thereafter levied the assessments, and the auditors of Hennepin and Scott counties immediately paid the shares of their counties to the District. The Dakota County auditor has paid the sum of $65,265.72, collected from the landowners in Dakota County who voluntarily paid their assessments. Payment of an additional $20,634.30 from other Dakota County landowners had been arranged for prior to the commencement of this action. The balance of the funds due the District from Dakota County was to be raised by the sale of general obligation bonds of the county on February 20, 1964. On February 11, at the request of plaintiffs, the county board canceled the bond sale and ordered the Dakota County auditor to withhold payment to the District of all funds collected from assessment payments. The board apparently did not consider the effect of this action on the District, which had up to that time expended $55,000, nor the fact that the Federal government had expended $62,000

on the project. Although the Federal government was ready, willing, and able to begin construction May 1, 1964, commencement of the channel-improvement project has been delayed due to the failure of the District to provide the items of local cooperation. Its inability to do so resulted from the refusal of Dakota County to pay its share of the local costs.

1-2-3. It was not until after the project had been approved and authorized, benefits and damages had been determined, and money raised by the assessments had been expended that plaintiffs commenced the present litigation. They seek to enjoin further action by the District and allege that the Watershed Act and the District's actions taken thereunder were unconstitutional.

The District moved to dismiss the complaint and also to require the plaintiffs to post a bond under §562.02. The trial court denied these motions and a motion by plaintiffs for an injunction, but refused to require the county board to pay its share of the costs for the project.

After trial without a jury the court found that c. 112 is so vague, ambiguous, discriminatory, and inconsistent that it is incapable of any reasonable interpretation or enforcement. It found also that the act is violative of the Fourteenth Amendment of the United States Constitution; of Minn. Const. art. 1, §§ 7 and 13; of Minn. Const. art. 4, §27, because it embraces more than one subject and attempts to legislate by reference to other laws; and of Minn. Const. art. 9, §1, because it attempts to provide for the assessment of benefits to plaintiffs' property without regard to cash valuation. The court concluded that plaintiffs were entitled to a permanent injunction enjoining defendants from doing any act in connection with the levy, collection, or enforcement of assessments for purported benefits to any land in Dakota County contained in the District.

The District contends on appeal that plaintiffs are in no position to maintain the present action for injunctive relief and that because of their failure to take advantage of their rights to appeal under the provisions of the Watershed Act they are no longer able to question the constitutionality thereof. Our agreement with these contentions makes it unnecessary to consider most of the assignments of error. Suffice it to say that the District contends that the Watershed Act is a constitutional exercise of legislative discretion which embraces one topic—the regulation and control of one of Minnesota's major natural resources, water; that there is no evidence that the District's actions were arbitrary and capricious; and that the record is clear that the District made every effort to acquaint the commmunity with the project, to give notice to the landowners involved, and to develop a fair and equitable basis for assessing the benefits resulting from the project. The District further insists that if it is correct in its contentions and if the challenge of unconstitutionality of the act is without any basis upon this record, the Dakota County board should be directed to pay the balance of the funds due for the project as requested by the District's cross-claim.

It is a well-established rule and a basic prerequisite for injunctive relief that a clear showing must be made that any legal remedy that the complainant may have is inadequate. AMF Pinspotters, Inc. v. Harkins Bowling, Inc., 260 Minn. 499, 110 N.W. (2d) 348; and Williams v. Rolfe, 257 Minn. 237, 101 N.W.(2d) 923.

This rule has been consistently applied in cases contesting the validity of assessments. Two Minnesota cases that strike to the very heart of this matter are Larson v. Freeborn County, 267 Minn. 383, 126 N.W. (2d) 771, and Village of Edina v. Joseph, 264 Minn. 84, 119 N.W. (2d) 809. The Larson case involved ditch proceedings and this court held that own-

ers affected by county ditch proceedings may not enjoin the collection of assessments levied to meet the expense of the construction but are limited to procedures for review established by statute, saying (267 Minn. 385, 126 N.W. [2d] 772):

"* * * [O]ur decision in the instant case is governed by [Rosso v. Village of Brooklyn Center, 214 Minn. 364, 8 N.W. (2d) 219]. That was a taxpayer's suit to enjoin a village from enforcing the payment of assessments for drainage improvements. We squarely held that where simple and direct remedies under what is now Minn. St. 429.036 and c. 278 are available to taxpayers, a demurrer to the complaint should be sustained and equitable relief denied. The Rosso decision was cited and approved in [Land O'Lakes Dairy Co. v. Village of Sebeka, 225 Minn. 540, 31 N.W. (2d) 660] and more recently in Village of Edina v. Joseph, 264 Minn. 84, 100, 119 N.W. (2) 809, 819, where we stated:

" 'The authorities generally indicate that relief against erroneous or illegal assessments will not be granted by a court of equity, if the property owner has an adequate remedy at law. If the statute or charter provides a remedy by appeal or otherwise, such remedy is generally exclusive and will preclude any resort to equity.' "

The principle that statutory remedies must be exhausted has been clearly spelled out, specifically in Land O'Lakes Dairy Co. v. Village of Sebeka, 225 Minn. 540, 548, 31 N.W. (2d) 660, certiorari denied, 334 U.S. 844, 68 S.Ct. 1513, 92 L.ed. 1768, where this court said, 225 Minn. 548, 31 N.W. [2d] 665):

"In order that there shall be no future confusion on this particular point of the law, we hold that in enacting M.S.A. 278 it was the intention of the legislature to provide an adequate, speedy, and simple remedy for any taxpayer to have the validity of his claim, defense, or objections determined by the district court in matters where the taxpayer claims that his real estate has been partially, unfairly, or unequally assessed, or that it has

> been assessed at a value greater than its real or actual value, or that the tax levied against the property is illegal in whole or in part, or has been paid, or that the property is exempt from the tax so levied."

Other cases where the same result has been reached are cited in the Larson case. These cases clearly indicate that it is not enough to claim that one has been denied an adequate remedy at law when he has simply neglected to invoke available remedies providing for appeal in a timely manner.

We said in Rosso v. Village of Brooklyn Center, 214 Minn. 364, 368, 8 N.W. (2d) 219, 221:

> "* * * It has been held by this court on numerous occasions that a taxpayer may not maintain a suit in equity to enjoin the collection of a tax or an assessment when he has an adequate remedy at law available to contest the proceeding or the collection of the tax or the assessment."

See, Wall v. Borgen, 152 Minn. 106, 108, 188 N.W. 159, 160; Schultz v. City of North Mankato, 176 Minn. 76, 222 N.W. 518.[3]

The authorities generally indicate that relief against erroneous or illegal assessments will not be granted by a court of equity if the property owner has an adequate remedy at law. If a statute or charter provides a remedy by appeal or otherwise, such remedy is generally exclusive and will preclude any resort to equity. Village of Edina v. Joseph, *supra*; 14 McQuillin, Municipal Corporations (3 ed.) §38.210. Plaintiffs herein could challenge their assessments by the appeal authorized in the Watershed Act but may not seek

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[3]See, also, Republic Iron & Steel Co. v. Borgen, 187 Minn. 373, 245 N.W. 615; Braddock I. Min. Co. v. Erskine, 155 Minn. 70, 192 N.W. 193; Kerr v. City of Waseca, 88 Minn. 191, 92 N.W. 932; Kelly v. Minneapolis City, 57 Minn. 294, 59 N.W. 304; Fajder v. Village of Aitkin, 87 Minn. 445, 92 N.W. 332; Albrecht v. City of St. Paul, 47 Minn. 531, 50 N.W. 608.

injunctive relief to bar the project for which the assessments were levied.

The Watershed Act has provided landowners with a right to obtain judicial review of the amount of damages awarded and the amount of assessments by appeal to the district court. §112.80. Plaintiff Adelman and some of the Dakota County landowners appearing as witnesses for plaintiffs, in this action have utilized this right to appeal their assessments and their actions are pending in the district court. These landowners are asserting the invalidity of the assessments on the same grounds as are asserted in the present action and since all matters raised in this action are or could have been before the court in a legal action, afforded by the statute, the present equitable action for an injunction does not lie. See, Webb v. Lucas, 125 Minn. 403, 147 N.W. 273; Heller v. Schroeder, 182 Minn. 353, 234 N.W. 461; Garrett v. Skorstad, 143 Minn. 256, 173 N.W. 406.

Sections 278.01 to 278.05 constitute a review statute enacted by the legislature in order to provide adequate, speedy relief to taxpayers in situations like that presented in the instant case and thus furnish another adequate legal remedy.

4. The finding of the trial court that this action was a class action cannot be sustained. See, Village of Edina v. Joseph, *supra*. The criteria for the bringing of a class action are established by Rule 23.01, Rules of Civil Procedure.[4] It is clear that plaintiffs' action is not a true class action under Rule 23.01(1) since the right that plaintiffs seek to assert on behalf of all landowners is not joint, common, or secondary. Neither does the action involve several claims asserted

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[4]The requisites of a class suit are discussed in Kainz v. Anheuser-Busch, Inc. (7 Cir.) 194 F. (2d) 737, 740; Slezak v. Ousdigian, 260 Minn. 303, 110 N.W. (2d) 1; Knowles v. War Damage Corp., 83 App. D.C. 338, 391, 171 F. (2d) 15, 18, and Hansberry v. Lee, 311 U.S. 32, 41, 61 S.Ct. 115, 118, 85 L.ed. 22, 27, 132 A.L.R. 741, 746.

against specific property, provided for in Rule 23.01(2). Nor can it be classed as a "spurious" class action, provided for in Rule 23.01(3), since plaintiffs have not alleged that the class right involves a common question of law or fact and that common relief is sought. Larson v. Freeborn County, *supra;* Land O'Lakes Dairy Co. v. Village of Sebeka, *supra;* Rosso v. Village of Brooklyn Center, *supra.*

5-6. Although it is unnecessary to consider further assignments of error, we think it clear that the court below was in error in allowing plaintiffs at this late stage in the project proceedings to question the constitutionality of the Watershed Act. Plaintiffs had several opportunities to assert their objections to the creation of the District and to the assessments levied by the Board of Managers for the channel-improvement project. Any proceeding in equity thereafter was untimely. The first of several appealable orders was entered March 23, 1960, when the Water Resources Board established the District. The second of such appealable orders was entered on September 15, 1961, when the Water Resources Board affirmed the over-all plan of the District. The third opportunity for review occurred on August 22, 1962, when the Board of Managers adopted the resolution establishing the channel-improvement project. Again plaintiffs had a right of appeal under the statute and could have asserted all their objections, constitutional or otherwise, but no such appeals were taken even though mailed or published notice was given to all owners of land subject to assessment. Plaintiffs also had a right of appeal under the Watershed Act from the order confirming the appraisers' report adopted September 12, 1963. Plaintiffs were personally served and attended the hearing on the report, but took no timely appeal on all the issues now being raised.

It is not to be overlooked that the Kelmar Corporation unsuccessfully sought an injunction on the ground that the

Watershed Act was unconstitutional. The District had delayed incurring expense until all constitutional issues relating to its procedure and authority were disposed of by the Scott County court action. Once the Scott County court had held the act to be constitutional the District moved ahead with the project, which is now well under way. All steps necessary to furnish items of local cooperation are nearly complete—lands have been assessed, assessments have been levied, money has been paid and expended by the District. Can plaintiffs now, after ignoring all opportunities to appeal any claimed constitutional issues, be heard to say they are entitled to an injunction? Certainly failure to exhaust available remedies in a timely manner when those remedies are simple, direct and expedient constitute a bar to an unseasonable action in equity. It cannot be said that the opportunities for plaintiffs to raise objections were either impractical or inadequate. As was said in Larson v. Freeborn County, 267 Minn. 383, 387, 126 N.W. (2d) 771, 773, plaintiffs "have not been denied an adequate remedy at law but have simply neglected to invoke available remedies in a timely manner."

A person who thinks that his constitutional rights are invaded by an act of the legislature or of an administrative board must raise the objection at the earliest available opportunity and exhaust the remedies which may have been provided for the correction of unreasonable and improper orders before he will be permitted to make an attack on the constitutionality of the statute. See, Carter v. Texas, 177 U.S. 442, 20 S.Ct. 687, 44 L.ed. 839; Chicago-Sandoval Coal Co. v. Industrial Comm., 301 Ill. 389, 134 N.E. 158; State ex rel. Powell v. State Bank of Moore, 90 Mont. 539, 4 P. (2d) 717, 80 A.L.R. 1494; Western & Atlantic R. v. Michael, 172 Ga. 561, 158 S.E. 426; Union Interchange, Inc. v. Allen, 140 Mont. 227, 370 P. (2d) 492; 16 Am. Jur. (2d) Constitutional Law, §115.

The only constitutional question that can be raised at this stage of the proceeding is whether the plaintiffs have been deprived of property without due process of law by an inadequate condemnation award or by an assessment in excess of the benefits conferred by the project, and the proper way to raise this question is by an appeal under §112.80 from the order of the Board of Managers confirming the appraisers' report.

Since plaintiffs failed to challenge the validity of the proceedings of the District, in a timely manner when the opportunity was present, they may not do so by this action. Clearly the public policy approved in Larson v. Freeborn County, *supra*, suggests that a proceeding properly initiated by a governmental body ought to be free from harassment by landowners who have slept on their rights.

However, we think it clear that in the absence of flagrant abuse or purely arbitrary action, the legislature, consistently with both the State and Federal Constitutions, may provide for the establishment of local watershed districts to include real property which will be specially benefited by drainage, flood control, or other improvements therein and may also provide that such districts, in order to acquire, construct, maintain, and operate such improvements, may impose special tax burdens upon the lands benefited. It has been held both by State and Federal courts that where, within the scope of its power, the legislature itself has found that the lands included in a special assessment district will be specially benefited by improvements, prior appropriate and adequate inquiry is presumed and the finding is conclusive. Chesebro v. Los Angeles County Floor Control Dist., 306 U.S. 459, 59 S.Ct. 622, 83 L.ed. 921; People ex rel. Chapman v. Sacramento Drainage Dist., 155 Cal. 373, 103 P. 207. In Louisville R. Co. v. Barber Asphalt Paving Co., 197

U.S. 430, 25 S.Ct. 466, 49 L.ed. 819, wherein a property owner claimed that a special assessment against its property for paving was unconstitutional because its use of the property made it impossible for the improvement to benefit the land, the United States Supreme Court, through Mr. Justice Holmes, said (197 U.S. 435, 25 C.St. 467, 49 L.ed. 822):

> "* * * That, apart from the specific use to which this land is devoted, land in a good-sized city generally will get a benefit from having the streets about it paved, and that this benefit generally will be more than the cost, are propositions which, as we already have implied, a legislature is warranted in adopting. But, if so, we are of opinion that the legislature is warranted in going one step further and saying that on the question of benefit or no benefit the land shall be considered simply in its general relations and apart from its particular use."

It is clear that the legislature may establish public corporations that are empowered to undertake improvement projects in order to conserve and regulate use of a natural resource. The Minnesota Watershed Act represents a solution which the legislatures of this and other states with similar acts have developed to deal with the complex problems of water conservation and use. As we see it, the Watershed Act embraces a single subject—water—within the meaning of Minn. Const. art. 4, §27, and its title encompasses the one general purpose of the act. The trial court found the act attempted to legislate by reference to other laws, but it has long been settled in this state that our legislature has authority to enact laws which refer to existing legislative acts.

It is clear also that the Watershed Act meets the requirements of due process since it affords a right of review and requires notice to all landowners affected by an improvement project. Looking at the act from every angle, we think it appears clearly that the solution found by the legislature of Minnesota to deal with the problems of water conservation

d use is not so inherently unreasonable that it may be
uck down on constitutional grounds.

We have carefully considered all of the assignments of
or raised on this appeal, but will not discuss them further
view of our conclusion that the trial court erred in grant-
an injunction. The order and judgment appealed from
st be reversed, and the trial court is directed to order that
kota County proceed forthwith to comply with the assess-
nt requirements in the same manner as other county
rds have done.

Reversed with directions.

s, Justice (concurring specially).

concur in the result.

APPENDIX B

STATE OF MINNESOTA — DISTRICT COURT
COUNTY OF SCOTT — FIRST JUDICIAL DISTRICT

The Kelmar Corporation, a Minnesota corporation,
Appellant,

vs.

Lower Minnesota River Watershed District, and the Board of Managers thereof,
Appellee,

and

Cargill, Inc., Northern States Power Company, Archer Daniels Midland Co., Imperial Refineries of Savage, Continental Grain Co., Peavey F. H. & Co., Central Soya Company, Inc., Minneapolis Gas Co., Chicago & Northwestern Railway Co., Metropolitan Airports Commission, City of Savage, City of Shakopee, City of Bloomington, Village of Burnsville, North Star Research & Development Institute, a Minnesota Non-Profit Corporation; State of Minnesota, Department of Highways, James C. Marshall, Commissioner,
Affected Owners.

In the Matter of the Improvement of the Minnesota River Navigation Channel from Mile Zero to Mile 14.7, and the Order of the Board of Managers Confirming the Appraisers' Report as to Benefits and Damages.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF LAW

The above matter came on for hearing on October 18, 1963, before the court without a jury on application of appellant for a temporary injunction restraining appellee from filing with the auditors of Hennepin, Scott and Dakota Counties their statement listing lands benefited and damaged by the proposed improvement of the Minnesota River from Mile

Zero to Mile 14.7. An order directing appellee to show cause why the injunction should not be granted, and a temporary restraining order preventing any action until the hearing was obtained by appellant on October 11, 1963. At the oral argument, appellee moved the court to limit appellant's notice of appeal to the questions of benefits determined and damages allowed.

Erickson, Popham, Haik & Schnobrich, by Raymond A. Haik, appeared on behalf of the appellee. Bundlie, Kelley and Torrison, by James C. O'Neill, appeared on behalf of appellant.

The court heard and considered oral argument of counsel, read and considered the respective briefs of counsel, and upon all the files and records herein makes the following:

FINDINGS OF FACT

1. On August 22, 1962, the Board of Managers of the Lower Minnesota River Watershed District adopted a resolution pursuant to Minnesota Statutes, §§ 112.67-112.69 establishing a project for the improvement of the Minnesota River from Mile Zero to Mile 14.7 in accordance with the River and Harbor Act of July 3, 1958 (Public Law 85-500).

2. On June 12, 1962, prior to the resolution establishing the project and agreeing to provide the items of local cooperation, the Board of Managers held a hearing, following mailed and published notice to landowners within the project area, to hear from affected landowners as to whether the Watershed District should agree to establish the channel improvement project from Mile Zero to Mile 14.7 and should agree to provide the items of local cooperation. Landowners were informed that the local costs, estimated to be $500,000, would be raised by assessment against affected land.

3. Maps of the project area prepared by the District Engineer defining the affected land assessment area, together

with the detailed maps of the project prepared by the U. S. Army Corps of Engineers, were displayed and referred to as the project area at the time of the hearing on June 12, 1962. The appellant appeared at the hearing of June 12, 1962, and was aware that its lands would be subject to an assessment if the project was undertaken by the Watershed District.

4. No appeals were taken from the August 22, 1962, resolution of the Board of Managers establishing the project for the improvement of the Minnesota River from Mile Zero to Mile 14.7 and obligating the District to provide the items of local cooperation required by the federal government.

5. On October 24, 1962, the Board of Managers appointed appraisers in accordance with Minnesota Statutes §112.69 to determine the benefits and damages. The appraisers filed their report with the Board of Managers on June 12, 1963, and thereafter on September 10, 1963, following mailed and published notice and personal service on affected property owners as required by law, the Board of Managers heard all parties interested for and against the confirming of the appraisers' report.

6. The appellant appeared at the hearing of September 10, 1963, and objected to the confirming of the appraisers' report. Appellant objected to the authority of the Board, the project area and formula established by the Board of Managers and used by the appraisers for their determination of lands benefited or damaged.

7. On September 12, 1963, the Board of Managers corrected certain errors and then confirmed the modified appraisers' report listing the benefits determined and damages allowed to lands within the project area.

8. The temporary restraining order obtained by the appellant on October 11, 1963, prevents the Managers from

filing the confirmed appraisers' statement with the county auditors of Hennepin, Dakota and Scott Counties.

9. Following the establishment of the project on August 22, 1962, the Board of Managers incurred expenses in excess of $40,000 in proceeding to provide the items of local cooperation. The federal government has expended $60,000 for planning and surveying and will defray entirely the cost of constructing the channel improvement amounting to the sum of $2,532,000. The Minnesota State Highway Department contribution to the construction cost is to be the sum of $430,000. The local costs to be assessed were estimated to be $350,000 at the hearing of September 10, 1963, and appellant's assessment at the hearing of September 10, 1963, was estimated to be $17,000.

Conclusions of Law

1. The Board of Managers will be unable to furnish the items of local cooperation for which they have obligated the Lower Minnesota River Watershed District unless they are able to file with the county auditors of Hennepin, Scott and Dakota Counties the confirmed appraisers' statement listing the property benefited and damaged. The county auditors spread the assessment against the lands listed in the report.

2. The funds to defray the items of local expense assumed by the District are provided by the respective boards of the counties where the lands in the project are located after filing of the confirmed appraisers' report. The effect of the temporary restraining order is to prevent the Board of Managers of the Watershed District from paying the damages allowed and providing the items of local cooperation required by their resolution of August 22, 1962.

3. The Board of Managers of a Watershed District have authority to establish as local projects the improvement of

a watercourse for navigation purposes in cooperation with the United States Government.

4. The Board's determination to assess lands in the project area from Milo Zero to Mile 14.7 by using an area formula based on land classification is a constitutional method of assessment. All lands similarly situated were assessed by use of this equitable formula.

5. Appellant has appeared at every stage in the proceeding beginning with the hearing of June 12, 1962. Appellant's constitutional rights are protected by its right of appeal to the district court for trial by jury on the questions of the amount of benefits determined or amount of damages allowed. No constitutional rights of appellant have been or will be impaired.

6. Appellant's motion and notice of appeal are not authorized insofar as they question the authority of the District to establish the project area and to assess land by use of an area formula based on land classification.

IT IS HEREBY ORDERED:

1. The appellant's motion for temporary injunction is denied.

2. The temporary restraining order issued by the court on October 11, 1963, is dissolved and appellee is allowed $1,500 for attorney's fees.

3. Appellant's notice of appeal will remain on the calendar for trial on the questions of the amount of damages allowed and the amount of benefits determined. The remaining issues raised by appellant's notice of appeal are denied.

4. The appeal is dismissed as to the affected owners listed in appellant's notice of appeal, with leave granted to appellant, within 10 days of the date of this order, to include and have considered the benefits determined or damages allowed

to property other than his own, provided the lands are described in the confirmed appraisers' report.

5. A stay of 30 days is granted to allow an appeal, provided that the bond, in the event of an appeal, shall be increased to an amount sufficient to cover the possible loss of federal and state contributions for the construction of the project and the Watershed District funds expended since establishment of the project on August 22, 1962.

Dated: November 1, 1963.

By the Court:

/s/ Harold E. Flynn
Judge of District Court

MEMORANDUM

The case is one of first impression for the court, it never having heard a matter involving a project undertaken by a watershed district. Although the matter came before the court under the urgency of a motion for temporary injunction, the court has had the full benefit of completed briefs and the replies of both parties.

Appellant has combined in its pleadings various requests for relief and it was helpful to refer to the total relief requested in the notice of appeal and in the motion for temporary injunction.

In its notice of appeal, appellant requests:

1. That the court enjoin the Board of Managers from filing the confirmed appraisers' statement listing lands benefited and damaged with the county auditors. Appellant contended that the method of land classification and assessment adopted by the Board was not authorized by law. The court is of the opinion that the Managers have been granted such authority and there is no basis for an appeal on this ground.

2. A decree determining that appellant's lands are not benefited in any ascertainable monetary fashion. The court has preserved the appellant's right of appeal on the question of benefits.

3. A decree determining appellant has been damaged in the sum of $25,000 as the result of the deprivation of river frontage. The court has preserved appellant's right of appeal on the question of damages.

4. A decree establishing and determining the true benefits which may be assessed against the several parties named in the notice of appeal. The court has dismissed the appeal as to all parties named by appellant, since it appears that many were not in the project area and therefore received no notice of the various proceedings nor were they assessed. The court has granted appellant leave to file a new notice of appeal which limits the review of other assessments to lands in the project area that were listed as benefited or damaged.

In its motion for temporary injunction, appellant requests:

1. That the court enjoin the appellee from filing with the auditors of Hennepin, Scott and Dakota Counties the confirmed appraisers' report. The court has reviewed the affidavit of James E. Kelley and Howard Dahlgren, one of the appraisers, as well as those of Kenneth W. Westerberg and Lawrence Samstad, and finds that the Board of Managers have adpoted and applied a fair method of determining assessments. Appellant may believe that his method of assessment is more equitable and in fact compelled by law, but the court has been shown no evidence which shows that the method adopted by the Board of Managers of the Watershed District and as applied by the appraisers is unreasonable or arbitrary and not authorized by law.

Due to the urgency of action, the court will state the principal cases it relies on in its memorandum without a great

deal of discussion, particularly since the several briefs submitted by the parties are quite detailed in their analysis.

The record consists of the pleadings, affidavits and exhibits presented at oral argument. It is not disputed that a project to improve the Minnesota River Channel from Mile Zero to Mile 14.7 was established by order of the Board of Managers of the Lower Minnesota River Watershed District on August 22, 1962. The federal project was authorized by the River and Harbor Act approved July 3, 1958 (Public Law 85-500). Designated items of local cooperation were required by Senate Document 144, 84th Congress, 2nd Session.

The project to improve the Minnesota River Channel from Mile Zero to Mile 14.7 was established by resolution of the Managers and is authorized by Minnesota Statutes §§ 112.67 to 112.69, which allow the Board of Managers of a watershed district to undertake projects with the United States Government where the cost of the improvement is to be paid by the government, but the right-of-way, legal and general expenses of the improvement are to be paid by the district. The procedure for the establishment of a cooperative project of this type differs from the procedure followed for a project undertaken in accordance with Minnesota Statutes §§ 112.43, 112.48-112.55. A cooperative project undertaken in accordance with §112.69 does not require a petition in the manner provided by Minnesota Statutes §112.47. The total cost of the improvement is estimated to be 3½ million dollars. The local costs, in the approximate sum of $350,000, are to be paid by assessment against land in the project area.

Appellant is in disagreement with the determination of the Board of Managers limiting the area to be assessed to lands within a portion of the District from Mile Zero to Mile 14.7. Appellant contends they didn't know if they would be affected because the Board of Managers indicated at the June 12, 1962, hearing that lands outside the project area could be

assessed. Appellant contends the Board should have reassessed the project following the hearing on the appraisers' report held on September 10, 1963. Appellant has listed in its appeal certain corporations outside the project area who own lands which were not assessed or listed in the confirmed appraisers' report.

One section of the Watershed Act, §112.80, governs appeals from all types of proceedings authorized by the Act, including those under §§ 112.69, 112.43, and 112.48-112.54. The appellant was required by §112.80, subd. 8, to appeal from the resolution of August 22, 1962, establishing the project. It contends that it may now question the judgment of the Board of Managers with respect to its authority to establish a project of this nature, the assessment procedure followed, and the portion of the Watershed District used for the purpose of determining the benefits and damages to lands. Appellant claims that this is a right accorded it under §112.80, subd. 1(4), which allows appeals from an order of the Managers which affects a substantial right. It also contends that it understood the Managers would assess land outside of Mile 14.7 after the June 12, 1962, hearing. Regardless of whether additional land could be assessed under another formula, the record is clear that the appellant knew its land would be subject to an assessment if a project were established after the June 12, 1962, hearing.

The procedure followed by the Board of Managers when undertaking a project pursuant to §112.69 is similar to the action of a municipality under Minnesota Statutes, Chapter 429. A hearing is held on the improvement with a right of appeal allowed. §§ 429.031-429.036. A later hearing is held on the assessment to pay for the improvement with the right of appeal allowed on the amount of the assessment. §§ 429.061-429.081. The appeal allowed by §429.081 does not

go back to contest the resolution ordering the improvement under §429.031. While it is true that there may still be persons assessed for an improvement by a municipality or watershed district who would not be assessed, or their assessment reduced, if another formula were used, [i.e., a front foot formula replacing an assessment based on land area], the landowner cannot complain if the formula used is reasonable and if he has a right of appeal. The procedure followed by the Watershed District is the same as that applied in cases of municipal improvement. The appellant was fully advised at all stages of the project from Mile Zero to Mile 14.7 and was aware that his lands might be assessed for the local costs. The time for appellant to contest the authority of the Watershed District establishing the Minnesota River Channel improvement as a local project from Mile Zero to Mile 14.7 was 30 days from the resolution of August 22, 1962. That the legislature intended to allow only appeals from benefits or damages at this stage in a project under §112.69 is clear when one notes that the Board of Managers could have filed the confirmed appraisers' report under §112.69, subd. 2, immediately after the September 12, 1963, meeting, rather than waiting for the appeal time to expire. In addition, the right of entry is available to the Managers after their resolution of September 12, 1963. §112.69, subd. 3.

The over-all plan of the District contemplates further projects of a similar nature and it is not unreasonable to assume that the assessment area defined by the Managers takes into account future projects which will involve assessment areas for projects upstream from the boundary established for the improvement from Mile Zero to Mile 14.7.

The time for appellant to appeal from the questions other than the benefits or damages was 30 days after the resolution of August 22, 1962, following the procedure set out in Minnesota Statutes §§ 112.80, subd. 8, 112.791 and 112.792. The only

action of the Board on September 12, 1963, related to the confirming of the appraisers' report. Appellant has a right to a trial in the district court by jury to secure the full damages to which it is entitled, as well as the reduction of the amount of benefits determined. While appellant may disagree with the project area for assessment purposes as determined by the Board of Managers of the Lower Minnesota River Watershed District, this disagreement is no basis for the relief requested by appellant. *Qvale v. City of Willmar*, 223 Minn. 51, 59, 25 N.W.2d 699 (1946). To afford the appellant an opportunity of questioning the entire project at this stage is to render §112.80, subd. 8, a meaningless provision in cooperative projects undertaken pursuant to §112.69. The items considered at a hearing under §112.69 are limited to appraisers' reports and are not as broad as those considered at a hearing on a project under §§ 112.54-112.55.

Appellant's contention that the present use of its property for agricultural purposes and the hunting of migratory game in season prevents its being assessed for a channel improvement project is not proper. Land use is irrelevant in determining benefits on which a special assessment can be based. *Louisville & Nashville R.R. v. Barber Asphalt Paving Co.*, 197 U.S. 430 (1905); *Kansas City Southern Ry. v. Road Improvement Dist.*, 266 U.S. 379 (1924); *In Re Improvement of Superior Street, Duluth*, 172 Minn. 554, 216 N.W. 318 (1927), *cert. denied*, 276 U.S. 623 (1928); *Board of Park Comm'rs. v. Bremner*, 190 Minn. 534, 252 N.W. 451, 253 N.W. 761 (1934); *Howard Park Co. v. City of Los Angeles*, 259 P.2d 977, 980 (1953).

Although the appellant has not appealed within the time allowed to contest the authority of the Watershed District to establish a navigation channel improvement project, the court will discuss its contention that the channel improvement of the Minnesota River is not the type of local project for which

an assessment can be made against lands abutting the improvement. The legislature has, by Minnesota Statutes §112.36, authorized the establishment of watershed districts for the improvement of streams and channels for drainage, navigation, or any other public purpose. It has, by §112.43, authorized the board of managers of an established watershed district to spend funds for the development of projects to accomplish the purpose for which the district was organized and to initiate, undertake, and construct projects not required to be initiated by a petition. The express authority is given the board of managers to cooperate with state and federal agencies. A different procedure is required for a project initiated by a petition than the procedure for establishment of cooperative projects undertaken pursuant to §§ 112.67-112.69. The legislature has provided that projects undertaken by watershed districts pursuant to §112.69 may be paid for by assessment against benefited lands. The determination of the Board of Managers of the Lower Minnesota River Watershed District establishing the project on August 22, 1962, is proper and was authorized by the Watershed Act. In addition to express statutory authorization, assessments against abutting lands for improvements of watercourses have been sustained. In *People ex rel. Chapman v. Sacramento Drainage Dist.*, 155 Cal. 373, 103 Pac. 207 (1909), the court stated:

> Upon the other hand, the lands adjacent to the rivers would be greatly and directly benefited by this work, and should be subject to special assessment to pay for the special benefit thus received. 103 Pac. at 211.
>
> * * * * *
>
> The harbor of San Francisco is benefited for purposes of navigation and commerce by a sea wall along the water front. At the same time it will not be questioned

> that the lands held in private ownership in close proximity to such sea wall, and which without such sea wall would be inundated "water lots," are especially benefited by this harbor work. The state, if it elects, may pay all the cost; but it will not be denied that the state has the power to impose upon the adjacent lands specially benefited by the work an assessment in proportion of such benefits, to defray a part of the cost. Or, again, in the matter of governmental power and control, the water highways of the state do not differ from the land highways. The power of the state to exact payment for the improvement of its streets from the owners of land adjacent thereto, in proportion to the benefits which their lands receive, is unquestionable and unquestioned. Legislation, which in like manner exacts similar contribution from lands adjacent to the inland waterways for like considerations, stand upon the same ground, and for the same reason may not be successfully assailed. The two classes of legislation are congeneric and have their origin and draw their inspiration from the same power and source—the governmental power of the state to tax, and to especially tax for a public purpose, where the work to be performed will confer a special benefit upon the property of the particular landowner, as distinguished from the general good which it will work to all. *Id.* at 212-13.

Appellant's attempt to question the action of the Board of Managers taken August 22, 1962, establishing the project area is based upon the argument that §112.69 requires that the appraisers be governed expressly by the provision of the drainage code found in §106.151. It is the court's opinion that the reference to the drainage code is to be applied only when not inconsistent with the watershed act. §112.72. To

apply the section as appellant suggests is to ignore the differences between a navigation project and a drainage project. The court is of the opinion that the Board of Managers have applied the applicable provisions of §106.151 to the extent that they are inconsistent with a navigation project. The various purposes for which a district can be established and projects performed are shown in §112.36. It is evident that many of these improvements will involve improvement of watercourses, but the assessment for such an improvement would, if §106.151 were exactly followed, be unconstitutional as being an inequitable basis for assessing property. The Board of Managers have applied an equitable formula to define the project area and to compute the benefits to lands in the project area. The broad language of §§ 112.69, 112.501, and 106.151 is meant to cover every type of possible project.

Appellant's argument that the corporations owning land developed and presently capable of using the river are the sole beneficiaries of the project results in a formula which would only assess an existing user and would not assess the non-corporate owner of similarly situated lands receiving the same benefit as the lands of a corporate user. The legislature has seen fit to authorize the board of managers of a watershed district to determine the assessment area and method of assessment. The appellant has been represented at all stages in the proceeding and has been afforded an opportunity to present its argument to the Board of Managers of the Watershed District before the project was undertaken and after the appraisers' report had been filed. The Board of Managers' determination apportioning the assessment against land on an equitable basis has been sanctioned by our court on many occasions and the appellant has not demonstrated any unreasonable act on the part of the Board of Managers which would justify the extreme remedy he seeks.

While appellant may disagree with the Board of Managers or have another method of assessment which would satisfy the requirement of an equitable assessment, the court has been shown no evidence, including the affidavit of appraiser Dahlgren, indicating the assessment formula used is improper or violates the law. The principal question is whether appellant's land has increased in value at least to the extent of the assessment. Appellant has a right to a trial on the issue of benefits and damages. *Qvale v. City of Willmar, supra; In Re Assessment for Paving Mississippi River Boulevard*, 169 Minn. 231, 232, 211 N.W. 9, 10 (1926); *Board of Park Comm'rs. v. Bremner, supra; Hughes v. Farnsworth*, 137 Minn. 295, 297, 163 N.W. 525 (1917); *In Re Assessment for Widening East Fourth Street*, 173 Minn. 67, 70, 260 N.W. 607 (1927); *Butters v. Oakland*, 263 U.S. 162 (1923); see generally, 14 McQuillan Municipal Corporations, §38.52 and §38.54 at p. 171.

In Re Judicial Ditch No. 12, 227 Minn. 482, 36 N.W.2d 336 (1949), involved a case where land was omitted from any assessment even though benefited. The viewers gave as their reason for the omission—"didn't bother the engineer about taking those extra lands in." The court held that:

> * * * even if lands that ought to have been assessed were omitted, it does not go to the validity of the order establishing the ditch or making the assessment.

The court noted that errors in assessment could be corrected on appeal.

Appellee is entitled to a reasonable attorneys' fee covering a portion of the cost involved in dissolving the temporary restraining order. *Frost v. Jordan*, 37 Minn. 544, 36 N.W.713 (1887). In the court's judgment, the volume of work required to be performed by appellee is of a value in excess of the amount allowed.

The court has granted a 30-day stay to appellant in which an appeal may be taken. The present bond in the amount of $250.00 is insufficient, and in the event an appeal is taken, the court will require the posting of a bond to insure that the portion of the funds of the Watershed District in excess of $40,000 which have been obligated will not be lost, as well as an amount sufficient to cover the federal and state funds placed in jeopardy by an injunction. Minnesota Statutes §562.02. *Gram v. Village of Shoreview*, 259 Minn. 145, 106 N.W.2d 553 (1960); *Ashenbrenner v. East Grand Forks*, 257 Minn. 368, 102 N.W.2d 28 (1960).

Appellant has no right to join under §112.80, subd. 4, owners of land outside of the project area and not subject to an assessment for local costs. It would appear that the §112.80, subd. 4, refers to land assessed along with those of appellant. To the extent that Items A and B of appellant's notice of appeal question the authority to the District to establish the project area and to assess land for the local costs, the order entered herein shall apply to these questions so that all questions other than the benefits determined or damages allowed can be determined in one appeal.

/s/ Harold E. Flynn
District Judge

(Title of Cause.)

(Kelmar Corporation vs. Lower Minnesota River Watershed District, et al.)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF COURT

The above-entitled matter came on for hearing on October 18, 1963, before the court without a jury on application of Appellant for a Temporary Injunction restraining Appellee from filing with the Auditors of Hennepin, Scott and Dakota

Counties their statement listing lands benefited and damaged by the proposed improvement of the Minnesota River from Mile Zero to Mile 14.7. An order directing Appellee to show cause why the injunction should not be granted, and a Temporary Restraining Order preventing any action until the hearing, was obtained by Appellant on October 11, 1963.

The court made and entered its Findings of Fact, Conclusions of Law, and Order on November 1, 1963, and thereupon Appellant presented several motions including a motion for leave to withdraw the first paragraph of its prayer seeking injunctive relief. Appellant further moved the court to amend certain phases of its Findings of Fact, Conclusions of Law and Order, or in the alternative, for a new trial or hearing.

These motions were presented and argued on November 15, 1963. Rundlie, Kelley and Torrison, by Mandt Torrison and James C. O'Neill, appeared on behalf of the Appellant. Erickson, Popham, Haik & Schnobrich, by Raymond A. Haik, appeared on behalf of Appellee.

The court having heard and considered oral argument, and having re-checked some of the data in support of its findings in light of Appellant's withdrawal of its request for an injunction,

NOW THEREFORE, the court withdraws its Findings of Fact, Conclusions of Law and Order, and substitutes therefor the following:

FINDINGS OF FACT

1. On August 22, 1962, the Board of Managers of the Lower Minnesota River Watershed District adopted a resolution pursuant to Minnesota Statutes §§ 112.67-112.69 establishing a project for the improvement of the Minnesota River from Mile Zero to Mile 14.7 in accordance with the River and Harbor Act of July 3, 1958 (Public Law 85-500).

2. On June 12, 1962, prior to the resolution establishing the project and agreeing to provide the items of local cooperation, the Board of Managers held a hearing, following mailed and published notice to landowners within the project area, to hear from affected landowners as to whether the Watershed District should agree to establish the channel improvement project from Mile Zero to Mile 14.7 and should agree to provide the items of local cooperation. Landowners were informed that the local costs, estimated to be $500,000, would be raised by assessment against benefited property.

3. Maps of the project area prepared by the District Engineeer, together with detailed maps of the project prepared by the U. S. Corps of Engineers, were displayed and referred to as the project area at the time of the hearing on June 12, 1962. Appellant appeared at that hearing and questioned witnesses concerning their opinion that its lands within the project area would be benefited if the project were undertaken by the Watershed District.

4. No appeals were taken from the August 22, 1962 resolution of the Board of Managers establishing the project for the improvement of the Minnesota River from Mile Zero to Mile 14.7 and obligating the District to provide the items of local cooperation required by the Federal Government.

5. On October 24, 1962, the Board of Managers appointed appraisers in accordance with Minnesota Statutes §112.69 to determine the benefits and damages. The appraisers filed their report with the Board of Managers on June 12, 1963, and thereafter on September 10, 1963, following mailed and published notice and personal service on affected property owners as required by law, the Board of Managers heard all parties interested for and against the confirming of the appraisers' report.

6. The Appellant appeared at the hearing of September 10, 1963, and objected to the confirming of the appraisers' report.

7. On September 12, 1963, the Board of Managers corrected certain errors and then confirmed the modified appraisers' report listing the benefits determined and the damages allowed to lands within the project area.

8. The Temporary Restraining Order obtained by the Appellant on October 11, 1963, prevents the Managers from filing the confirmed appraisers' statement with the County Auditors of Hennepin, Dakota and Scott Counties.

9. Following the establishment of the project on August 22, 1962, the Board of Managers incurred expenses in excess of $40,000 in proceeding to provide the items of local cooperation. The federal government has expended $60,000 for planning and surveying and will defray entirely the cost of constructing the channel improvement amounting to the sum of $2,532,000. The Minnesota State Highway Department contribution to the construction cost is to be the sum of $430,000. The local costs to be assessed were estimated to be $350,000 at the hearing of September 10, 1963, and Appellant's assessment at the hearing of September 10, 1963, was estimated to be $17,000.

10. The Board of Managers of the Watershed District will be unable to furnish the items of local cooperation for which they have obligated the District unless they are able to file with the County Auditors of Hennepin, Scott and Dakota Counties the confirmed appraisers' statement listing the property benefited and damaged. The County Auditors spread the assessment against the lands so listed.

11. The funds to defray the items of local expense assumed by the District are provided by the respective boards of the counties where the lands in the project are located after

filing of the confirmed appraisers' report. The effect of the Temporary Restraining Order is to prevent the Board of Managers of the Watershed District from paying the damages allowed and providing the items of local cooperation required by their resolution of August 22, 1962.

12. The board of managers of a watershed district have authority to establish projects for the improvement of a watercourse for navigation purposes in cooperation with the United States Government.

13. Appellant has appeared at every stage in the proceeding beginning with the hearing of June 12, 1962. All of Appellant's constitutional rights are protected by its right of appeal to the district court.

14. Appellant does not question the authority of the District to establish and undertake the instant project. The District determined benefits to lands by using an area formula based on land classification, and all lands similarly situated in the project area were assessed by use of this formula. The court does not find sufficient evidence of irreparable injury here because Appellant has an adequate remedy at law by virtue of the statutory appeal procedures under M.S.A. §112.80.

15. By its Notice of Appeal Appellant has brought into the case three public or private corporations, namely, Peavey, F. H. & Co., City of Shakopee and North Star Research & Development Institute, none of which is located within the project area established by the Board of Managers. Such corporations were not given notice of the proceedings by the Watershed District and Appellant consents to the dismissal of its Notice of Appeal as to said named corporations.

CONCLUSIONS OF LAW

1. The Court does not find sufficient evidence of irreparable injury here to justify granting of Appellant's Motion for Temporary Injunction nor to continue the Restraining Order previously issued in this case. Appellant, by virtue of the statutory appeal procedures under M.S.A. §112.80, has an adequate remedy at law for the determination of all questions raised by Appellant in its Notice of Appeal.

IT IS HEREBY ORDERED:

1. Appellant's Motion for a Temporary Injunction is dismissed and the application therefor denied.

2. The Temporary Restraining Order heretofore issued on October 11, 1963, is dissolved.

3. Paragraph (1) of the prayer for relief in Appellant's Notice of Appeal may be withdrawn and is hereby stricken on the basis of the Motion of counsel for Appellant.

4. Appellant's Notice of Appeal is dismissed as to the following named affected owners outside the project area:

Peavey, R. H. & Co.
City of Shakopee.
North Star Research & Development Institute.

5. Appellee is allowed to file, forthwith, with the County Auditors of Hennepin, Dakota and Scott Counties, the confirmed appraisers' statement listing the properties benefited and damaged as shown by the confirmed appraisers' report.

6. Appellant waives its right to appeal from this Order.

Dated: November 26, 1963.

By the Court:

/s/ Harold E. Flynn
Judge of District Court

(Title of Cause.)

(Kelmar Corporation vs. Lower Minnesota River Watershed District, et al.)

JUDGMENT

This matter came on to be heard before the court without a jury, and the court having made and filed its findings of fact and conclusions of law.

IT IS ORDERED as follows:

The court does not find sufficient evidence of irreparable injury here to justify granting of appellant's motion for temporary injunction nor to continue the restraining order previously issued in this case. Appellant, by virtue of the statutory appeal procedures under M.S.A. §112.80, has an adequate remedy at law for the determination of all questions raised by appellant in its notice of appeal.

Appellant's motion for a temporary injunction is dismissed and the application therefore denied.

The temporary restraining order heretofore issued on October 11, 1963, is dissolved.

Paragraph (1) of the prayer for relief in appellant's notice of appeal may be withdrawn and is hereby stricken on the basis of the motion of counsel for appellant.

Appellant's notice of appeal is dismissed as to the following named affected owners outside the project area:

Peavey, F. H. & Co.
City of Shakopee.
North Star Research & Development Institute.

Appellee is allowed to file, forthwith, with the County Auditors of Hennepin, Dakota and Scott Counties, the confirmed appraisers' statement listing the properties benefited and damages as shown by the confirmed appraisers' report.

Appellant waives its right to appeal from this order.

Dated: November 27, 1963.

By the Court:

/s/ Hugo P. Hentges

(Seal) Clerk of District Court

APPENDIX C

MINNESOTA WATERSHED ACT

112.34. WATERSHED ACT; DECLARATION OF POLICY; CITATION. Subdivision 1. In order to carry out conservation of the natural resources of the state through land utilization, flood control and other needs upon sound scientific principles for the protection of the public health and welfare and the provident use of the natural resources, the creation of a public corporation, as an agency of the state for the aforesaid purposes, has been provided. This chapter shall be construed and administered so as to make effective these purposes.

Subd. 2. This chapter shall be known and may be cited as "Minnesota Watershed Act."

112.35 DEFINITIONS. Subdivision 1. For the purposes of this chapter the terms defined in this section have the meaning ascribed to them.

Subd. 2. "Person" includes firm, copartnership, association, or corporation but does not include public or political subdivision.

Subd. 3. "Public corporation" means a county, town, school district, or a political division or subdivision of the state, other than a watershed district.

Subd. 4. "Board" means the Minnesota water resources board established by Minnesota Statutes, Section 105.71.

Subd. 5. "Managers" means the board of managers of a watershed district.

Subd. 6. "Publication" means publication once a week for two successive weeks in accordance with Minnesota Statutes, Section 645.11.

Subd. 7. "Public health" includes any act or thing tending to improve the general sanitary conditions of the district.

Subd. 8. "Public welfare," "general welfare," and "public benefit" include any act or thing tending to improve or benefit or contribute to the safety or well-being of the general public or benefit the inhabitants of the district.

Subd. 9. "County auditor" means the county auditor of any county affected by a watershed district.

Subd. 10. "Clerk" means the clerk of the district court of the county in which any judicial proceeding concerning a district is pending.

Subd. 11. "Engineer" means the engineer designated by the managers to act as engineer.

Subd. 12. "Appraisers" mean the persons appointed by the managers of the district to ascertain and report benefits and damages arising from proposed work.

Subd. 13. "Director" means the director of the division of water.

Subd. 14. "Commissioner" means the commissioner of conservation.

Subd. 15. "Petition" means an initiating petition for "work," and may consist of one or more petitions therefor.

Subd. 16. "Nominating petition" means an initiating petition for the creation of a watershed district, and may consist of one or more petitions therefor.

Subd. 17. "Hearing" means a hearing conducted by either the managers or the board, which, if conducted by the board pursuant to rules promulgated by it, may be formal, pro-

vided, however, that all interested parties shall be given a reasonable opportunity to be heard.

Subd. 18. "Interested party" means any public corporation or any person having an interest in the subject matter pending or involved, and shall include the director or any agency of government.

Subd. 19. "Work" or "works" means any construction, maintenance, repairs or improvements of a watershed district.

Subd. 20. "Notice by mail" or "mailed notice" means a notice mailed and addressed to each person entitled to receive notice if the address be known to the auditor or clerk, or can be ascertained by inquiry at the office of the county treasurer of the county wherein the affected land or property is located.

Subd. 21. "Resident owner" or "resident freeholder" means the owner of land or he contract purchaser, and who resides in the state.

112.36 ESTABLISHMENT OF DISTRICTS. The board is hereby vested with jurisdiction, power, and authority, upon filing of a nominating petition, to establish a watershed district and define and fix the boundaries thereof, all areas of which shall be contiguous and which may be entirely within or partly within and partly without any county, and may include the whole or any part of any watershed or watersheds within the discretion of the board and may include the whole or any part of one or more counties, and to appoint the first board of managers thereof, as herein provided.

A watershed district may be established for any or all of the following conservation purposes:

(1) Control or alleviation of damage by flood waters;

(2) Improvement of stream channels for drainage, navigation, and any other public purpose;

(3) Reclaiming or filling wet and overflowed lands;

(4) Providing water supply for irrigation;

(5) Regulating the flow of streams and conserving the waters thereof;

(6) Diverting or changing watercourses in whole or in part;

(7) Providing and conserving water supply for domestic, industrial, recreational, or other public use;

(8) Providing for sanitation and public health and regulating the use of streams, ditches, or watercourses for the purpose of disposing of waste;

(9) Repair, improve, relocate, modify, consolidate, and abandon, in whole or in part, drainage systems within a watershed district;

(10) Imposition of preventive or remedial measures for the control or alleviation of land and soil erosion and siltation of watercourses or bodies of water affected thereby;

(11) Regulating improvements by riparian landowners of the beds, banks, and shores of lakes, streams, and marshes by permit or otherwise in order to preserve the same for beneficial use.

112.37 PROCEDURE FOR ESTABLISHMENT. Subdivision 1. Proceedings for the establishment of a watershed district shall be initiated only by the filing of a nominating petition with the secretary of the board, which nominating petition shall be signed either by not less than 25 per cent of the resident freeholders of the proposed district, exclusive of the resident freeholders within the corporate limits of any city, village or borough on whose behalf the authorized officials have signed the petition, or by the authorized officials of any county, city, village, and borough authorized by resolution duly passed by the governing body thereof; however, if

signed by at least one-half of the counties within the proposed district or by a county or counties having at least 50 per cent of the area within the proposed district; or by a majority of the cities, villages or boroughs within the proposed district, the same need not be signed by freeholders.

Said nominating petition shall set forth the following:

(1) The name of the proposed district;

(2) The necessity for the district, and why it would be conducive to public health and public welfare, or accomplish any of the purposes of a watershed district;

(3) A statement in general terms setting forth the purpose of the contemplated improvements, the territory to be included in the district, and all proposed subdivisions thereof, if any, of the district;

(4) The number of managers proposed for the district. The managers shall be not less than three nor more than five and be selected from a list of ten nominees. They shall be selected as representative of the local units of government affected and none shall be a public officer of the county, state, or federal government;

(5) A map of the proposed district;

(6) A request for the organization of the district as proposed.

The petitioners shall cause to be served upon the county auditor or auditors of the counties affected by the proposed district, the commissioner, and the director, a copy of said nominating petition, and proof of service thereof shall be attached to the original petition, to be filed with the secretary of the board.

Subd. 2. Upon receipt of a copy of such nominating petition the county auditor or auditors, as the case may be, shall determine whether or not the petitioners are freeholders, which determination shall be made upon the tax records,

which shall be prima facie evidence of ownership, and from which the auditor shall certify his determination to the board.

Subd. 3. Upon receipt of a copy of the nominating petition by the director he shall:

(1) Acknowledge receipt thereof to the board;

(2) Prepare a preliminary watershed map of the proposed district showing the natural boundaries and subdivisions thereof;

(3) Prepare a preliminary report based upon the nominating petition and other available data, stating his opinion as to the desirability of organizing the district, and submit his report to the board with such recommendation as he may deem proper, which report shall be submitted to the board within 30 days from the date of the service of the petition upon the director, unless such time is extended by the board.

Subd. 4. At the time of filing the nominating petition, or before notice of a hearing thereon is given, a bond shall be filed by the petitioners with the board, to be approved by it, in such sum as the board shall determine. Such bond shall be so conditioned that the petitioners, in case the petition is dismissed or denied, will pay all costs and expenses arising therefrom. If at any time during the proceedings the board deems it necessary to require an additional bond, it may by its order so direct. In such event no further proceedings shall be had until such additional bond is filed. No bond shall be required when the petition is signed by a county board or the governing body of three or more cities, villages, or boroughs.

Subd. 5. No petition containing the requisite number of signatures or petitioners or signed by the requisite number of counties, cities, villages or boroughs shall be void or dis-

missed on account of any defects therein, but the board shall, at any time prior to the close of hearing, permit the petition to be amended in form and substance to conform to the facts by correcting any errors in the description of the territory or by supplying any other defects therein. Several similar petitions, or duplicate copies of the same petition, for the organization of the same district may be filed and altogether be regarded as one petition. All petitions filed prior to the hearing hereinafter provided shall be considered by the board as part of the original petition.

After a petition has been filed, no petitioner may withdraw therefrom except with the written consent of all other petitioners filed with the water resources board.

112.38 HEARING, NOTICE. When it has been made to appear to the board that a sufficient nominating petition has been filed, the board shall, within 35 days thereafter, by its order, fix a time and place, within the limits of the proposed district, for a hearing thereon. Notice of such hearing shall be given by the board by publication published once each week for two successive weeks prior to the date of hearing in a legal newspaper, published in the county or counties in which a part or all of the affected waters and lands are located; the last publication shall occur at least ten days before the hearing. Notice shall also be mailed by the board to the county auditor and to the chief executive official of any municipality affected, which notice shall contain the following:

(1) That a nominating petition has been filed with the board, and a copy thereof with the county auditor of the county or counties affected;

(2) A general description of the purpose of the contemplated improvement, and the territory to be included in the proposed district;

(3) The date, time, and place of hearing, and

(4) That all persons affected thereby or interested therein may appear and be heard.

112.39 ACTION OF BOARD UPON PETITION. Subdivision 1. At the time and place fixed for the hearing on the nominating petition, all persons interested in or affected by the contemplated improvement shall be given an opportunity to be heard. The board may continue the hearing from time to time as it may deem necessary.

Subd. 2. For the purpose of carrying out the provisions of this chapter and to hold hearings, the chairman of the board, or any member thereof, shall have the power to subpoena witnesses, to administer oaths, and to compel the production of books, records, and other evidence. Witnesses shall receive the same fees and mileage as in civil actions. All persons shall be sworn before testifying, and the right to examine and cross-examine witnesses shall be the same as in civil actions. The board shall cause a record of all proceedings before it to be made and filed with the secretary of the board. Copies thereof may be obtained upon such terms and conditions as the board shall prescribe.

Subd. 3. Upon the hearing if it appears to the board that the establishment of a district as prayed for in the nominating petition would be for the public welfare and public interest, and that the purpose of this chapter would be subserved by the creation of a watershed district, the board shall, by its findings and order, establish and create a watershed district and give it a corporate name by which, in all proceedings, it shall thereafter be known, and upon filing a certified copy of said findings and order with the secretary of state such watershed district shall become a political subdivision of the state, with the authority, power, and duties as prescribed in this chapter.

Subd. 4. The findings and order of the board shall name the first board of managers of the district whose term of office shall be for one year, and until their successors are appointed and qualified, and shall designate the place within the district where the principal place of business of the district shall be located, and define the boundaries of the district, which may be changed upon a petition therefor, and a notice and hearing thereon, in the same manner as in the original proceeding.

Subd. 5. A copy of the findings and order shall, at the time of filing a certified copy thereof with the secretary of state, be mailed to the county auditor of each county affected, the commissioner, and director.

Subd. 6. If the board should determine that the establishment of a district as prayed for in the nominating petition would not be for the public welfare and public interest, and would not serve the purpose of this chapter, the board shall, by its decision, dismiss the proceedings. A copy of such order shall be forthwith mailed to the county auditor of each county affected, and to the commissioner, and director.

112.40 RULES OF PRACTICE. The board shall adopt rules of practice for its proceedings and hearings, not inconsistent with the provisions of this chapter and other provisions of law, as it deems necessary and expedient.

112.401 HEARINGS; REFERENCE. In any proceeding under Minnesota Statutes, Chapter 112, where a public hearing is required, the board may refer any question of fact to a member of the board or referee either to hear evidence and report it to the board or to hear evidence and make findings of fact and report them to the board.

112.41 PERPETUAL EXISTENCE. A district created under the provisions of this chapter shall have perpetual existence with power, but only to the extent necessary for lawful con-

servation purposes, to sue and be sued, to incur debts, liabilities and obligations, to exercise the power of eminent domain, to provide for assessments, and to issue certificates, warrants, and bonds and do and perform all acts herein expressly authorized, and all other acts necessary and proper for carrying out and exercising the powers expressly vested in it.

112.411 PROCEDURE FOR TERMINATION. Subdivision 1. Proceedings for the termination of a watershed district shall be initiated only by the filing of a petition with the secretary of the board, which petition shall be signed by not less than 25 per cent of the resident freeholders of the district. Such petition shall state that the existence of the district is no longer in the public welfare and public interest and that it is not needed to accomplish the purposes of the Minnesota watershed act.

The petitioners shall cause to be served upon the county auditor or auditors of the counties affected a copy of said petition and proof of service thereof shall be attached to the original petition, to be filed with the secretary of the board.

Subd. 2. Upon receipt of a copy of such petition the county auditor or auditors shall determine whether or not the petitioners are resident freeholders within the district, which determination shall be made, upon the tax records, which shall be prima facie evidence of ownership, and from which the auditor shall certify his determination to the board.

Subd. 3. At the time of filing the petition or before notice of a hearing thereon is given, a bond shall be filed by the petitioners with the board to be approved by it and in such sum as the board may determine, conditioned that the petitioners, in case the petition is dismissed or denied, will pay all costs and expenses therefrom.

Subd. 4. When it appears to the board that a sufficient petition has been filed, the board shall within 35 days there-

after, by its order fix a time and place, within the district, for a hearing thereon. The provisions of this section relating to notice and conduct of a hearing upon a nominating petition shall govern.

If the board should determine that the existence of the district is no longer in the public welfare and public interest and that it is not needed to accomplish the purpose of the Minnesota watershed act the board shall by its findings and order terminate the district. Upon filing a certified copy of said findings and order with the secretary of state such district shall cease to be political subdivision of the state.

Subd. 5. The board shall not entertain a petition for termination of a district within five years from the date of its formation nor shall it make determinations pursuant to petitions in accordance with provisions of this section, more often than once in five years.

112.42 MANAGERS; ORGANIZATION, APPOINTMENT OF SUCCESSORS. Subdivision 1. At the time of filing a certified copy of the findings and order with the secretary of state, the board shall cause personal service of a copy thereof to be made upon the managers named therein. Within 10 days after such personal service has been made the managers shall meet at the designated principal place of business of the district and shall take and subscribe the oath defined in Minnesota Constitution, Article V, Section 8, which oath as subscribed shall be forthwith filed with the secretary of the board. Each manager shall thereupon file with the board a bond in the sum of $1,000, the premium to be paid by the district for the faithful performance of his duties. The amount of such bond may be increased by the board if in the judgment of the board it becomes necessary. The managers shall thereupon organize by electing one of their number as president, another as secretary, and another as treasurer,

and provide the necessary books, records, furniture, and equipment for the conduct and the transaction of their official duties.

Subd. 2. The board of managers shall adopt a seal and shall efficiently keep a record of all proceedings, minutes, certificates, contracts, bonds of its employees, and all other business transacted or action taken by the board, which record shall be, at all reasonable times, open to inspection by the property owners within the district, and all other interested parties.

Subd. 3. At least 30 days prior to the expiration of the term of office of the first managers named by the board, the county commissioners of each county affected shall meet and proceed to appoint successors to the first managers. Provided, however, if the nominating petition that initiated the district shall be originated from a majority of the cities, villages, or boroughs within the district the county commissioners shall appoint the managers from a list of nominees submitted by the townships and municipalities within the district. Said list shall contain at least three nominees for each position to be filled. It shall be submitted to the affected county board at least 60 days prior to the expiration of the term of office. If such list is not submitted within 60 days prior to the expiration of the term of office the county commissioners shall select the managers from eligible individuals within the district. Said county commissioners shall at least 30 days before the expiration of the term of office of any managers meet and appoint the successors. If the district affects more than one county, distribution of the managers among the counties affected shall be as directed by the board. The term of office of each manager, if the number does not exceed three, shall be one for a term of one year, one for a term of two years, and one for a term of three years.

If the managers consist of five members, one shall be for a term of one year, two for a term of two years, and two for a term of three years. If the district affects more than one county, the board shall direct the distribution of the one, two and three year terms among the affected counties. Thereafter, the term of office for each manager shall be for a term of three years, and until his successor is appointed and qualified. Any vacancy occurring in an office of a manager shall be filled by the county commissioners representing the county in which the vacating manager did reside. A record of all appointments made under this subdivision shall be filed with the county auditor of each county affected, with the secretary of the board of managers, and with the secretary of the water resources board. No person shall be appointed as a manager who is not a voting resident of the district and none shall be a public officer of the county, state, or federal government.

Subd. 4. The provisions of Minnesota Statutes, Section 351.02, shall apply to members of the board of managers.

Subd. 5. The compensation of the members of the board of managers shall not exceed $10 per day, and each member shall be entitled to reimbursement for all traveling and other expenses necessarily incurred in the performance of his official duties.

Subd. 6. The managers shall adopt by-laws, rules, and regulations not inconsistent wtih this chapter for the administration of the business and affairs of the district.

Subd. 7. The managers shall meet annually and at such other times as may be necessary for the transaction of the business of the district. A meeting may be called at any time upon the request of any manager, and when so requested the secretary of the district shall mail a notice of such meeting to each member at least eight days prior thereto.

112.43 MANAGERS; POWERS, DUTIES. Subdivision 1. The managers, in order to give effect to the purposes of this chapter may:

(1) Make necessary surveys or utilize other reliable surveys and data and develop projects to accomplish the purposes for which the district is organized and may initiate, undertake, and construct projects not required to be instituted by a petition under section 112.47.

(2) Cooperate or contract with any state or subdivision thereof or federal agency or private or public corporation.

(3) Construct, clean, repair, alter, abandon, consolidate, reclaim or change the course or terminus of any public ditch, drain, sewer, river, watercourse, natural or artificial, within the district.

(4) Acquire, operate, construct, and maintain dams, dikes, reservoirs, and appurtenant works.

(5) Regulate, conserve, and control the use of water within the district.

(6) Acquire by gift, purchase, or the right of eminent domain necessary real and personal property.

(7) Contract for or purchase such insurance as the managers deem necessary for the protection of the district.

(8) Establish and maintain devices for acquiring and recording hydrological data.

(9) Enter into all contracts of construction authorized by this chapter.

(10) Enter upon lands within or without the district to make surveys and investigations to accomplish the purposes of the district. The district shall be liable for actual damages resulting therefrom.

(11) To take over when directed by the district court or county board all judicial and county drainage systems with-

in the district, together with the right to repair, maintain, and improve the same. Whenever such judicial or county drainage system is taken over in whole or in part, the same, to the extent so taken over, shall become a part of the works of the district.

(12) Provide for sanitation and public health and regulate the use of streams, ditches, or watercourses for the purpose of disposing of waste and preventing pollution.

(13) Borrow funds from any agency of the federal government.

(14) Adopt rules and regulations to effectuate the purposes of the act and the authority of the managers.

Subd. 2. The district court may enforce by injunction or other appropriate order the provisions of section 112.37 to 112.81 and any rule or regulation adopted or order issued by the managers thereunder.

Subd. 3. The managers shall annually make and file a report of the financial conditions of the district, the status of all projects and work therein, the business transacted by the district, and other matters affecting the interests of the district. Copies of said report shall be transmitted to the secretary of the state water resources board, the commissioner, and the director.

Subd. 4. The exercise of said powers by the managers shall at all times be subject to review by the board as herein provided.

112.44 ADVISORY COMMITTEE. The managers, upon qualifying, shall appoint an advisory committee consisting of at least five members, who shall be selected if practicable as follows: one shall be a supervisor of a soil conservation district; one shall be a member of a county board; one shall be a member of a sportsmen's organization, and one shall be a member of a farm organization and others may be appointed

at the discretion of the managers, which appointees shall be residents of the district, and shall serve during the pleasure of the managers. The committee shall advise and assist the managers upon all matters affecting the interests of the district, and shall make recommendations to the managers upon all contemplated projects and works of improvement within the district.

112.45 EMPLOYEES, DUTIES. The managers may employ a chief engineer, professional assistants, and such other employees as may be necessary, and provide for their qualifications, duties and compensation. The chief engineer shall be superintendent of all the works and improvements; he shall make a full report to the managers each year, or more often if necessary. A copy of such report and all recommendations by the chief engineer shall be transmitted to the managers and the director. The managers may require any officer or employee of the district to give a bond for the faithful performance of his duties, in an amount prescribed by them, the cost thereof to be paid from the funds of the district.

112.46 OVER-ALL PLAN. The managers shall, within a reasonable time after qualifying, adopt an over-all plan for projects and improvements within the district for reclamation, drainage, erosion, and flood control, and improvement of lands, soils, waters, forests, wild life, and projects therein. A copy of such plan shall forthwith be transmitted to the county auditor of each county affected, the secretary of the board, the commissioner, the director, the chief executive official of any municipality affected, and the supervisors of any soil conservation district having territory within the district. The managers shall forthwith cause a notice that such plan has been adopted to be posted at three conspicuous places within the district. Upon receipt of such copy the commissioner and the director shall examine the same and with-

in 20 days thereafter shall transmit to the board recommendations in connection therewith, a copy of which shall be transmitted to the managers, the county auditor of each county affected, the chief executive official of any municipality affected, and the supervisors of affected soil conservation districts. Within 45 days the board shall have a hearing on the proposed plan, the provisions of this chapter relating to notice, time, and place of hearing upon a nominating petition governing. After such public hearing the board shall, by its order, prescribe a project and improvement plan for the district. A copy thereof shall be transmitted to the managers, the county board of each county affected, the commissioner, and the director, the chief executive official of any municipality affected, and the supervisors of affected soil conservation districts whereupon said plan shall become the project and improvement plan for the district. Said plan may be amended upon a petition therefor, and a notice and hearing thereon, in the same manner as in the original proceeding.

112.47 WORKS INSTITUTED ONLY UPON PETITION. All works of the district authorized by the general plan, as adopted, which are to be paid by assessment upon the benefited properties, shall be instituted only upon a petition filed with the managers of the district, as prescribed by this chapter.

112.48 APPROVAL OF PROJECT AND IMPROVEMENT PLAN; FILING OF PETITION; CONTENTS; BONDS. Subdivision 1. After the project and improvement plan of the district has been approved and adopted, as provided for in section 112.46, a petition may be filed with the managers for any project or improvement within the district conforming in general with said plan. The petition therefor must be signed by not less than 25 per cent of the resident freeholders, or by the owners of more than 25 per cent of the property within the limits

of the area proposed to be improved, provided however if the project or improvement petition consists of a drainage proceeding as defined in Minnesota Statutes, Chapter 106, such petition shall be signed by a majority of the resident owners of the land described in the petition or by the owners of at least 60 per cent of the areas of such land. The land described in the petition shall be those over which the proposed improvement passes or is located, or such petition may be signed by a county board of any county affected, or by the governing body of any city, village, or borough lying wholly or partly within the area proposed to be improved. Provided, however, if the proposed project affects lands exclusively within a city, village, or borough, the petition shall originate from the governing body of such city, village, or borough. For the purposes of this section, holders of easements for electric or telephone transmission or distribution lines shall not be deemed freeholders or owners. Such petition shall contain the following:

(1) A description of the work proposed and the purpose to be accomplished;

(2) A description of the lands over which the proposed improvement passes or is located;

(3) A general description of the part of the district which will be affected, if less than the entire district;

(4) The need and necessity for the proposed improvement;

(5) That the proposed improvement will be conducive to public health, convenience, and welfare;

(6) A statement that the petitioners will pay all costs and expenses which may be incurred in case the proceedings are dismissed or for any reason no contract for the construction thereof is let.

Subd. 2. Upon the filing of a petition and before any action is taken thereon one or more of the petitioners shall make and file a bond payable to the watershed district named in the petition in the sum of not less than $2,000 with good and sufficient sureties, to be approved by the board of managers of the district with whom the bond is filed, conditioned to pay all costs and expenses which may be incurred in case the proceedings are dismissed or for any reason no contract is entered into for the construction of the improvement petitioned for. If the costs incurred or to be incurred exceed the amount of the existent bond the managers shall require an additional bond under the conditions and as provided in Minnesota Statutes, Section 106.051, insofar as applicable. Provided that if the petition is signed by the proper officials of a county, city, village, or borough no bond shall be required.

112.49 SURVEYS, PLANS. Subdivision 1. If it appears to the managers that the petition is sufficient, that the proposed improvement is for public interest and welfare, and is practicable and in conformity with the over-all plan for projects and improvements of the district, they shall cause to be made, at the earliest time possible, all necessary surveys and plans for the construction of the proposed improvement. The engineer designated by the managers shall make a report to the managers of his findings and recommendations relative to the proposed improvement. If he finds the improvement feasible he shall include in his report a plan of the proposed project including:

(1) A map of the area to be improved, drawn to scale, showing thereon: the location of the proposed improvements; the location and adequacy of the outlet; the watershed of the project area; the location of existing highways, bridges and culverts; all lands, highways and utilities affected, together with the names of the owners thereof, so far

as known; the outlines of any public lands and public bodies of water affected; such other physical characteristics of the watershed as may appear necessary for the understanding thereof;

(2) The estimated total cost of the completion of the project including costs of construction and all supervision and administrative costs of the project;

(3) The acreage which will be required and taken as right of way listed by each lot and 40 acre tract, or fraction thereof, under separate ownership;

(4) Such other details and information to inform the managers of the practicability and necessity of the proposed improvements together with his recommendations thereon.

Subd. 2. The engineer may adopt and approve and include as a part of his report, any project of the state of Minnesota or the United States which is pertinent to the project and may accept any data, plats, plans, details, or information pertaining to such state or federal project furnished to him by the state or federal agency and the engineer shall omit from his report those items called for in subdivision 1 if the data furnished by the state or federal agency is sufficient to meet the requirements of subdivision 1.

Subd. 3. If the engineer's report is unfavorable the managers shall within 35 days thereafter by order fix a time and place within the district for a hearing at which the petitioners shall show cause why the managers shall not refer the petition back to the petitioners for such further proceedings thereon as the managers may determine or dismiss the petition. The notice shall state that the engineer's report is unfavorable, that it is on file with the managers and is subject to inspection, and the time and place for hearing thereon. The managers shall mail a copy of the notice to each of the petitioners at least 14 days before the hearing.

Subd. 4. The petitioners may dismiss the petition, upon payment of costs and expenses.

Subd. 6. Upon the filing of the engineer's report, a complete copy thereof shall be transmitted to the director by the managers.

The director shall examine the same and within 15 days make his report thereon to the managers. If he finds the report incomplete and not in accordance with the provisions of Minnesota Statutes, Chapter 112, he shall so report. If he approves the same as being a practical plan he shall so state. If he does not approve the plan he shall file his recommendations for changes deemed advisable, or if in his opinion the proposed project or improvement is not practical he shall so report. If a soil survey appears advisable he shall so advise and in such event the engineer shall make the soil survey and report thereon before the final hearing. The director's report shall be directed to and filed with the managers. Such report shall be deemed advisory only.

No notice shall issue for the hearing until the director's report is filed or the time for filing thereof has expired.

112.50 APPRAISERS, DUTIES. Subdivision 1. Upon the filing of the engineer's report the managers shall, with the least possible delay, appoint three disinterested resident freeholders of the state to act as appraisers. These appraisers shall subscribe on oath to faithfully and impartially perform their duties, and with or without the engineer, shall determine the benefits or damages to all lands and properties affected by the proposed project or improvement, including lands owned by the state of Minnesota or any department thereof, highways, and other property likely to be affected by the proposed improvement or that may be used or taken for the construction or maintenance thereof. Benefits and damages to lands owned by the state of Minnesota or any

department thereof held and used for the purposes described in section 106.672 shall be determined subject to the provisions thereof, so far as applicable. The appraisers shall receive not to exceed $35 per day and necessary expenses while engaged in the performance of their official duties, to be paid by the district and included in the cost of improvement.

112.501 BENEFITED PROPERTY, DETERMINATION. Subdivision 1. The appraisers shall classify the lands found to be benefited. Where the proposed improvement includes or prays for the construction or improvement of any ditch, stream, river, or watercourse, or any structures for the control or alleviation of damages from flood waters, the appraisers shall be governed by Minnesota Statutes, Section 106.151.

Subd. 2. In all proceedings under this act assessments for benefits against lands or corporations shall be made upon benefits to such lands or corporations by reason of the project or improvement affecting the same. Benefited properties shall include:

(1) All lands or corporations, including lands owned by the state of Minnesota or any subdivision thereof receiving direct benefits such as drainage, commercial navigation, disposal of sewage or waste material, protection from overflow by flood control improvements, prevention of siltation, control of erosion, or maintenance of lake levels;

(2) All lands contributing water that are furnished a drainage outlet by the construction or improvement of any artificial or natural drain or watercourse;

(3) All lands that are not receiving but need drainage and that are furnishing waters that are handled or controlled by the proposed improvement.

(4) Benefits to the state by reason of the improvement of lakes, streams, or other bodies of water as a place for propagation, protection and preservation of fish and other forms

of wildlife, which benefits shall be assessable against the state of Minnesota to the extent and in the manner provided for assessments against the state in Minnesota Statutes, Sections 84A.55, Subdivision 9, and within the available appropriation.

(5) Benefits to municipal corporations which occur to the lands in the municipality generally and which may be in addition to special benefits to specific lands within the municipality.

112.51 APPRAISERS' REPORT, EXAMINATION. Upon filing of the appraisers' report the managers shall examine it to determine if it was made in conformity with the requirements of this chapter, and if the total benefits thus found are greater than the total estimated costs and damages. If the appraisers' report is lacking in any particulars the managers may recommit it to the appraisers for further study and report.

112.52 HEARING UPON PETITION AND REPORTS. Upon the filing of the report of the engineer and the appraisers appointed herein by the managers, they shall, within 35 days thereafter, by order, fix a time and place within the district for a hearing upon the petition and reports. Due notice thereof shall be given by the managers as herein provided.

112.53 NOTICE OF HEARING, CONTENTS. Subdivision 1. The managers shall by publication give notice of the pendency of the petition; the time and place for hearing thereon; that the engineer's and appraisers' reports, including the plans, have been filed with the managers and are subject to inspection. The notice shall contain a brief description of the proposed improvement, together with a description of the properties benefited or damaged, and the names of the owners thereof, the public and other corporations affected thereby as shown by the engineer's and appraisers' reports; and require all parties interested in the proposed improve-

ment to appear before the managers at the time and place designated in the notice and there present their objections, if any they have, and show cause why an order should not be made by the managers granting the petition and confirming the reports of the engineer and the appraisers and ordering the establishment and construction of the improvement.

Subd. 2. The managers shall give notice by mail, within one week after the beginning of publication, to the director and to each person, corporation, and public body affected by the proposed improvement as shown by the engineer's and appraisers' report. The notice shall contain a brief description of the proposed improvement and state: that the engineer's and appraisers' report are on file with the managers and available for public inspection; the time and place of hearing; and that the addressee's name appears as an affected party.

Subd. 3. When it is required that the managers acquire land in fee simple estate, they shall, prior to the filing of the appraiser's report, record in the office of register of deeds of the county in which the lands are situated, a notice of the pendency of a proceeding initiated by the managers to acquire the lands, which notice shall state the purpose for which the lands are to be taken. At least 20 days before the hearing, notice of the hearing in addition to that required in subdivisions 1 and 2 hereof shall be served upon owners of the property, in the same manner as the summons in a civil action, which notice shall describe the land, state by whom and for what purpose it is to be taken and give the names of all persons appearing of record or known to the managers to be the owners. The notice shall also state that benefits and damages have been determined, and that a hearing will be held by the managers at the time and place specified in the notice.

Subd. 4. Where the improvement affects the lands and properties in more than one county, separate notices shall be prepared and published in each county affected showing only in the general description of the proposed improvement and the names and descriptions of the properties affected in the county. Notice by mail as provided in subdivision 2 shall be given.

112.54 HEARING BEFORE MANAGERS, APPEAL. At the time and place specified in the notice, the managers shall hear all parties interested for and against the granting of the petition and confirming the reports. All questions relative to the proposed improvement including jurisdiction, sufficiency of the petition, practicability and necessity shall be determined upon evidence presented at the hearing. Any findings made by the managers prior to the hearing shall not be conclusive but shall be subject to further investigation, consideration, and determination at the hearing. They may order and direct the modification of the engineer's report within the scope of the over-all improvement plan for the district, and the assessment of benefits and damages and amend or change the list of property reported as assessable for the construction and maintenance thereof. If the amended reports include property not included in the original reports, the managers shall adjourn and cause to be published and mailed, as in the original notice, the proper notice with reference to all lands and properties not included in the previous notice. If upon full hearing the managers find that the improvement will be conducive to public health and promote the general welfare, and is in compliance with the provisions and purposes of this chapter, and that the benefits resulting therefrom will be greater than the cost of the construction and damages, they shall make findings accordingly and order and direct the construction of the improvement and confirm the

report of the engineer and the findings and report of the appraisers and may by this order authorize the construction of the proposed improvement as a whole or for different parts thereof separately. The managers shall order the engineer to proceed with making the necessary surveys and preparing such plans and specifications as are needed to construct the proposed improvements and report the same to the managers with reasonable dispatch. The hearing then shall be recessed to await the engineer's report and receipt of bids, when it may again be recessed to allow compliance with section 112.541 of this act if said section 112.541 becomes applicable.

112.541 PROCEDURE WHEN CONTRACT IS NOT LET. If after the receipt of the bids, no bids are received except for a price more than 30% in excess of the engineer's estimate as contained in his report, or for a price in excess of the benefits, less damages and other costs, the managers shall follow the procedure described in Minnesota Statutes, Section 106.241.

112.55 ORDER OF MANAGERS ESTABLISHING THE IMPROVEMENT, FILING. The order of the managers establishing the improvement and authorizing the construction thereof shall forthwith be filed with the secretary of the district, and a certified copy thereof shall be filed with the auditor of each county affected, the board, the commissioner, the director, and the state department of health.

112.57 BIDS. After an order has been made by the managers directing the establishment of each improvement, the managers shall call for bids for the construction of the work and give notice thereof by publication specifying therein the time and place when the bids will be opened for the letting of a contract for the construction of the work. The contract may be let in sections or as a whole, as the managers may direct. Notice thereof shall be published in at least one of

the newspapers in the state where such notices are usually published. At a time and place specified in the notice, the managers may accept or reject any or all bids and may let the contract to the lowest responsible bidder, who shall give a bond, with ample security, conditions for the carrying out of the contract. Bids shall not be entertained which in the aggregate exceed by more than 30% the total estimated cost of construction. Such contract shall be in writing and shall be accompanied by or shall refer to the plans and specifications for the work to be done, and prepared by the engineer for the district. The plans and specifications shall become a part of the contract. The contract shall be approved by the managers, signed by the president and secretary thereof, and by the contractor.

112.58 WORK MAY BE DONE WITHOUT A CONTRACT. In case of emergency, and in order to protect the interests of the district, work may be done under the direction of the managers and the engineer, without a contract, to the extent necessary to protect the interests of the district.

112.59 CONTROL OF CONTRACTS. In all cases where contracts are let by the managers, they shall have full control of all matters pertaining thereto. If a contractor fails to complete the improvement within the time or in the manner specified in the contract, the managers may extend the time for completion or may refuse an extension of time or may cancel the contract and readvertise and relet the contract. They may require the surety for the contractor to complete the improvement or proceed to have the contract otherwise completed at the expense of the contractor and his surety. They may take such other action with reference thereto that the occasion may require in the interest of the district. The provisions of Minnesota Statutes, Chapter 106, so far as pertinent, apply to and govern the relations between the engi-

neer and the contractor, including the examination and report of the engineer and the amount and time of payment. The managers shall keep an accurate account of all expenses incurred, which shall include the compensation of the engineer and his assistants, the compensation and expenses of the appraisers as provided in section 112.50, the compensation of petitioners' attorney, the cost of petitioners' bond, the fees of all county officials necessitated by the improvement which shall be in addition to all fees otherwise allowed by law, and the time and expenses of all employees of the district, including the expenses of the managers while engaged in any improvement. The fees and expenses provided for herein shall be audited, allowed and paid upon the order of the managers and shall be charged to and be treated as a part of the cost of the improvement.

112.60 ASSESSMENTS, LEVIES. Subdivision 1. Upon the filing by the managers with the auditor of any county of a statement listing the property and corporations benefited or damaged or otherwise affected by any improvement as found by the appraisers and approved by the managers, he shall assess the amount specified in such list against the lands and municipalities or other corporations as therein specified in accordance with the pertinent provisions of Minnesota Statutes, Chapter 106.

Subd. 2. Upon filing of the statement as provided in subdivision 1 the county board of each county affected shall provide funds to meet its proportionate share of the total cost of the improvements, as shown by the report and order of the managers of the district, and for such purposes is authorized to issue bonds of the county in such amount as may be necessary in the manner provided by Minnesota Statutes, Section 106.411. In the event an improvement is to be constructed under the provisions of section 112.69, the provi-

sions of Minnesota Statutes, Section 106.411 requiring the county board to let a contract for construction before issuing bonds shall not be applicable to bonds issued to provide the funds required to be furnished by this section.

Subd. 3. The respective county auditors and county treasurers shall levy and collect the amount shown in the tabular statement and lien as provided in Minnesota Statutes, Sections 106.341 to 106.401. All moneys received by the treasurer of any county from the sale of bonds, assessments, or otherwise, for the benefit of the district shall be by him accounted for and paid over to the treasurer of the district.

Subd. 4. No assessment shall be levied against any property or corporations benefited under the provisions of this chapter in excess of the amount of benefits received as fixed by the order of the managers authorizing the construction of the improvement or subsequently determined on appeal.

112.61 FUNDS OF DISTRICT. Subdivision 1. The moneys of any district organized under the provisions of this chapter consist of:

Subd. 2. An organizational expense fund, which consists of an ad valorem tax levy, not to exceed two mills on each dollar of assessed valuation of all taxable property within the district or $20,000 whichever is the lesser. Such funds shall be used for organizational expenses, and preparation of an over-all plan for projects and improvements. The managers of the district shall be authorized to borrow from the affected counties up to 75 per cent of the anticipated funds to be collected from the organizational expense fund levy and the counties affected are hereby authorized to make such advancements. The advancement of anticipated funds shall be apportioned among affected counties in the same ratio as the assessed valuation of the area of the counties within the district bears to the assessed valuation of the entire district. In

the event an established district is enlarged, an organizational expense fund may be levied against the area added to the district in the same manner as above provided. Unexpended funds collected for the organizational expense may be transferred to the administrative fund and used for the purposes authorized therein;

Subd. 3. An administrative fund, which consists of an ad valorem tax levy not to exceed one mill on each dollar of assessed valuation of all taxable property within the district, or $20,000, whichever is the lesser. Such funds shall be used for general administrative expenses and for the construction and maintenance of projects of common benefit to the district. The managers may make an annual levy for this fund as provided in section 112.611;

Subd. 4. A bond fund, which consists of the proceeds of bonds issued by such district, as herein provided secured upon the property of the district which is producing or is likely to produce a regular income and is to be used for the payment of the purchase price of the property or the value thereof as fixed by the court in proper proceedings, and for the improvement and development of such property;

Subd. 5. A construction and maintenance fund, which is to be supplied by: the sale of county bonds; construction loans from any agency of the federal government; and by special assessments to be levied as herein provided to supply funds for the construction and maintenance of the improvements of the district, including reservoirs, ditches, dikes, canals, and other works, together with the expenses incident thereto and connected therewith. Construction loans from any agency of the federal government may be repaid from monies collected by special assessments upon properties benefited by the improvement as herein provided;

Subd. 6. A preliminary fund, which consists of funds provided as herein specified, and is to be used for preliminary work on proposed works of the district.

112.611 BUDGET; TAX LEVY. Subdivision 1. On or before October 1 of each year the managers shall adopt a budget for the ensuing year and shall decide upon the total amount necessary to be raised from ad valorem tax levies to meet its budget. After adoption of the budget and no later than October 1, the secretary of the district shall certify to the auditor of each county within the district the county's share of such tax, which shall be an amount bearing the same proportion to the total levy as the assessed valuation of the area of the county within the watershed bears to the assessed valuation of the entire watershed district. The maximum amount of any levy shall not exceed that provided for in Minnesota Statutes 1961, Section 112.61 and acts amendatory thereof.

112.62 DISTRICT COURT TO CREATE PRELIMINARY FUND. Subdivision 1. As soon as the managers are appointed and have qualified, and a petition and bond have been filed with the managers praying for the construction of an improvement within the district, the managers may file a petition with the district court in the county wherein the principal place of business of the district is situate asking that an order be made creating a preliminary expense fund for the district. At least ten days' notice of such application shall be given to the auditor of each county affected by the proposed improvement. The fund applied for shall be of a size proportionate to meet the needs of the district for preliminary work on the proposed improvement.

Subd. 2. The district court upon hearing may designate the amount of the fund and fix the proportionate amount that each county affected by the improvement shall pay, in

proportion to the area in the county affected by the proposed improvement. The court shall order the auditor of each county to draw his warrant upon the treasurer of the county for the payment of the amount specified in the order, payable to the treasurer of the district. The sum so advanced by the county shall be charged to the district, and shall be repaid with interest as soon as the district has funds for that purpose. The funds so provided shall be used by the managers for preliminary work. When the managers incur expenses for surveys or other preliminary work on any proposed improvement, all expenses connected with such work shall be included in the cost of construction of the proposed improvement. When the construction of the improvement is authorized by the managers the funds advanced from the preliminary fund shall be repaid out of receipts from assessments.

Subd. 4. The state of Minnesota and any department or political subdivision thereof may appropriate such sums as are necessary to pay its proportionate share of such preliminary expenses, determined by the managers according to the benefits that will probably accrue to the corporation from the contemplated improvements.

112.63 WARRANTS. The managers of any district may issue warrants of the district in payment of any contracts for the construction of any improvements, for all ordinary general expenses, and for all expenses incurred in making repairs. When sufficient funds are not available to pay and warrant after its presentation to the treasurer of the district, the warrant draws interest at a rate not to exceed six per cent per annum until paid or until notice is given by the district that funds are available for its payment. Except for warrants issued in payment of construction of any improvement, the funds for which have been provided, the outstanding warrants of the district shall not exceed $5,000.

112.64 LEVY FOR REPAIR OF IMPROVEMENT. The managers of any district, upon the certification of the engineer that an improvement situate in the district is in a state of disrepair, may levy upon the benefited land and property, as originally assessed for such improvement. The managers may order or direct the repair or provide funds for the maintenance or repair of such improvement upon filing a copy of the order for levy by the managers with the auditor of each county affected by such improvement against property and corporations within the limits of the county originally benefited thereby. The auditor shall extend the levy against the property within the limits of the county as provided in other proceedings for the levy, assessment, and collections of taxes ordered, levied, and collected by the district court or the county board in drainage proceedings.

If the managers find that the estimated cost of such repair, including all fees and costs incurred for proceedings relating thereto, is less than $2,000, it may have such work done by day labor without advertising for bids or entering into a contract therefor.

112.65 DRAINAGE SYSTEMS WITHIN DISTRICT. Subdivision 1. The managers of a district shall take over when directed by the district court or county board any judicial or county drainage system within the district, together with the right to repair, maintain and improve the same. Such transfer may be initiated by the district court or county board, or such transfer may be initiated by a petition from any person having an interest in the drainage system or by the managers. No such transfer shall be made until the district court or county board has held a hearing thereon. Due notice of the proposed transfer together with the time and place of hearing shall be given by two weeks' published notice in a legal newspaper of general circulation in the area involved. All

interested persons may appear and be heard. In all proceedings for the repair, maintenance, or improvement the managers shall conform to the provisions of Minnesota Statutes, Chapter 106.

Subd. 2. Construction of all new drainage systems or improvements of existing drainage systems within the district shall be initiated by filing a petition with the managers of the district.

112.66 DAMAGE TO HIGHWAY OR BRIDGE BY PASSAGE OF EQUIPMENT. In case it is necessary to pass any dredge or other equipment through a bridge or grade or any highway or railroad owned by any corporation, county, town, or municipality, the managers shall give 20 days' notice to the owner of the bridge or grade so that the same may be removed temporarily to allow the passage of such equipment, or an agreement may be immediately entered into for such purposes. The owner of the bridge or grade shall keep an itemized account of the cost of removal and if necessary, of the replacing of the bridge or grade and the actual cost shall be paid by the district. In case the owner of the bridge or grade refuses to provide for the passage of the equipment, the managers may remove such bridge or grade at the expense of the district, interrupting traffic in the least degree consistent with good work and without delay or unnecessary damage. In case the managers are prevented from doing so, the owner of the bridge or grade shall be liable for the damages resulting from the delay.

112.67 CONTRACTS OF COOPERATION AND ASSISTANCE. The managers may enter into contracts or other arrangements with the United States government, or any department thereof, with persons, railroads, or other corporations, with public corporations, and the state government of this state or other states, or any department thereof, with drainage, flood con-

trol, soil conservation, or other improvement districts, in this state or other states, for cooperation or assistance in constructing, maintaining, and operating the works of the district, or for the control of the waters thereof, or for making surveys and investigations or reports thereon; and may purchase, lease, or acquire land or other property in adjoining state in order to secure outlets; to construct and maintain dikes or dams or other structures for the accomplishment of the purposes of this chapter.

112.68 OTHER STATUTES APPLICABLE. The provisions of Minnesota Statutes, Sections 471.59 and 471.64, are hereby made applicable to districts organized under this chapter.

112.69 CONSTRUCTION BY GOVERNMENTAL AGENCIES, APPRAISERS' REPORT. Subdivision 1. Where an improvement is to be constructed within the district under a contract between the managers of said district and the state of Minnesota, or any department thereof, or by the United States of America, or any department thereof, wherein the cost of the improvement is to be paid for by the governmental agency but the rights-of-way, legal, and general expenses of the improvement are assumed by the district, the managers shall appoint three disinterested freeholders of the state to act as appraisers. After the appraisers so selected subscribe to an oath to faithfully and impartially perform their duties, they shall, with or without the engineer, determine the benefits or damages to all lands and properties affected by the proposed improvement. They shall make and file with the managers a detailed statement showing the actual damages that have resulted or will result to individuals, property, or corporations from the construction of the improvement and make and file with the managers a detailed statement and list of lands and other property, including highways and corporations, receiving actual benefits by way of drainage, control of flood waters, or by other means herein authorized.

Subd. 2. Upon the filing of the appraisers' report and the plans and engineering data prepared by the governmental agency the managers shall prepare a detailed statement of all costs and damages to be incurred in the construction of the improvement. They shall within 35 days thereafter by order fix a time and place within the district for a hearing upon the report. The managers shall cause notice to be given by publication and mailing as above provided for a hearing on a petition. At the time and place specified in the notice, the managers shall hear all parties interested for and against the confirming of the report; and may order and direct the modification of the assessment of benefits and damages, and amend or change the list of properties reported as benefited or damaged. If the amended reports include property not included in the original notice the proper notice with reference to all lands and properties not included in the previous notice. If upon full hearing the managers find that the benefits resulting from the construction will be greater than the assessments and damages they shall confirm the report. All persons or public corporations affected by the order may appeal therefor as herein provided.

Upon the filing by the managers with the auditor of any county of a statement listing the property and corporations benefited or damaged or otherwise affected by any improvement as found by the appraisers and approved by the managers, proceedings shall he had as provided in section 112.60.

Section 112.47 is not applicable to works of the district constructed under contract as provided in this section.

Subd. 3. When it is required that the board of managers convey to the United States Government the fee simple estate or a lesser interest in real property, the managers shall, prior to the filing of the appraiser's report, record in the office of the register of deeds of the county in which the lands are

situated, a notice of the pendency of a proceeding initiated by the managers to acquire the lands to be conveyed to the United States government which notice shall state the purpose for which the lands are to be taken. At least 20 days before the hearing upon the appraiser's report, notice of the hearing in addition to that required by subdivision 2 hereof shall be served upon the owners of the property to be conveyed to the federal government, in the same manner as the summons in a civil action, which notice shall describe the land, state by whom and for what purpose it is to be taken and give the names of all persons appearing of record or known to the managers to be the owners. The notice shall also state that appraisers have been appointed in the manner provided by subdivision 1 hereof, to determine the benefits and damages, and that a hearing will be held by the managers upon the appraiser's report at the time and place specified in the notice. When the managers have confirmed the appraiser's report listing the property benefited or damaged as provided in subdivision 2, the managers shall have all rights of possession and entry conferred in other cases of condemnation by Minnesota Statutes 1961, Section 117.20, Subd. 7. Thereafter, the attorney for the managers shall make a certificate describing the land taken, the purpose for which taken, and reciting the fact of payment of all awards as determined by the appraisers appointed by the managers or judgments in relation thereto, which certificate, upon approval thereof by the managers, shall establish the right of the watershed district in the lands taken and shall be filed for record with the register of deeds of the county in which the lands are situated, which record shall be notice to all parties of the title of the watershed district to the land therein described. Thereafer the managers are authorized to convey such lands and interests acquired to the United States Government.

112.70 CLAIMS FOR DAMAGES. Every person or public corporation claiming damages from the district for or on account of any loss or injury sustained by reason of any defect in the construction or operation of any improvement constructed by a governmental agency under contract with the managers, as herein provided, or by reason of the negligence of its officers, agents, servants, or employees, shall present to the managers at the office of the secretary, within 30 days after the alleged loss or injury, a written notice stating the time, place, and circumstances thereof and the amount of damages claimed or other relief demanded. No action therefor may be maintained unless such notice is given. The action shall be commenced within one year after the occurrence of the loss or injury.

112.71 USE OF WATER, CONTRACTS; NOTICE, HEARING. The rights enjoyed by landowners, whether private or corporate, to the use of the waters of the district for any purpose shall continue as they existed at the time of the organization of the district and all such rights then existing shall be recognized and observed by the managers, but when improvements made by the district make possible a greater, better or more convenient use of or benefit from such waters shall be the property of the district, and such rights may be leased or assigned by the district in return for reasonable compensation, as provided herein.

All leases, assignments, permits or contracts for the use of water shall be entered into only after a report has been made by the managers of such district to the board setting forth the terms and conditions of the lease, permit, or contract relative to the use of any property of the district. The secretary of the board shall give due notice thereof to all parties interested, by mail, and shall cause to be published notice of the application, stating therein the purpose of the application and the time and place of hearing thereon. At

the time of hearing the board shall hear all interested persons for or against such proposed contract and make its order accordingly upon such conditions and restrictions as may be necessary to protect the interest of the district and of the public.

112.72 OTHER DRAINAGE LAWS, EFFECT OF REFERENCE. Whenever reference is made herein to any drainage laws of this state and sections thereof are referred to, the sections and provisions shall if not consistent with Minnesota Statutes, Chapter 112, be treated and construed as having the same force and effect, so far as the provisions of this chapter are concerned, as though herein set forth. Any amendments of such act or acts passed after the effective date of this chapter shall become applicable to this chapter.

112.73 MANAGER'S REPORTS; AUDIT BY PUBLIC EXAMINER. The managers shall make such reports as are demanded by the public examiner. The public examiner shall audit the books and accounts of the district once each year, if funds and personnel permit. The district receiving such examination shall pay to the state the total cost and expenses of such examination, including the salaries paid to the examiners while actually engaged in making such examination. The revolving fund of the public examiner shall be credited with all collections made for any such examinations.

112.74 EXISTING DISTRICTS MAY COME UNDER CHAPTER. Any district heretofore organized under the provisions of Minnesota Statutes 1953, Sections 111.01 to 111.42, or Sections 112.01 to 112.33, may acquire the right to operate under and exercise all the rights and authority of this chapter, instead of the act under which it was organized, upon the filing by the governing board of such district, in the office of the clerk of district court of the county in which its principal place of business is situate, a petition to the court asking

that the district be granted such authority. The clerk of district court, as directed by the judge, shall thereupon fix a time and place for hearing upon the petition. Notice of the hearing shall be given by publication for two successive weeks in a newspaper published in each county having territory within such district. If at the hearing the court finds that it is for the best interests of the district to be granted such authority, it may by order grant such petition. Thereafter the district may exercise the authority provided for in this chapter.

112.75 WATERSHED DISTRICTS; PENDING PROCEEDINGS FOR ESTABLISHMENT OF DISTRICT. In any proceeding for the establishment of a district under Minnesota Statutes 1953, Chapters 111 or 112, pending April 23, 1955, any person affected thereby or interested therein may petition the district court of the judicial district wherein the lands affected are situated for an order transferring such proceedings to the state water resources board, and the court shall thereupon make an order transferring such pending proceedings to said board, whereupon the board shall be vested with jurisdiction and all further proceedings shall be subject to the provisions of this chapter. Such transfer shall not be construed as depriving the court of jurisdiction over any judicial question which at the time of the petition is pending therein and is undetermined. The court by its order shall direct that all records pertaining to said proceedings shall be delivered to the state water resources board.

112.76 CORPORATE EXISTENCE OF CERTAIN DISTRICTS, TERMINATION. The corporate existence of any district organized under the provisions of Minnesota Statutes 1953, Sections 112.01 to 112.33, wherein no work has been performed during the five-year period immediately prior to April 23, 1955, shall be terminated unless within one year thereafter such district makes application for authority to continue its corporate ex-

istence under the provisions of this chapter. The procedure to provide a record of the termination of a district shall be initiated by a petition from the Minnesota Water Resources Board to the district court of the county in which its principal place of business is situated. Said petition shall contain a statement to the effect that no work was performed during the five-year period immediately prior to April 23, 1955 and that no application was made to continue the districts' operation under Minnesota Statutes, Chapter 112. The clerk of the district court, as directed by the judge, shall fix a time and place for hearing upon the petition. Notice of the hearing shall be given by publication for two successive weeks in a newspaper published in each county having territory within such district. If the court finds that the facts in the petition exist it shall issue an order finding the fact of the termination of the district. A copy of such order shall be filed in the office of the secretary of state.

After April 23, 1955, no new district shall be organized under the provisions of Minnesota Statutes 1953, Chapter 112.

112.761 PROCEEDINGS FOR ENLARGEMENT OF DISTRICT. Subdivision 1. Proceedings for the enlargement of an existing district shall be initiated by a petition filed with the secretary of the board. The required signatures on a petition to enlarge shall be the same as prescribed for a nominating petition, provided, however, the percentages shall be calculated only with reference to the territory which is proposed to be added to the district. Such petition shall state:

(1) That the area to be added is contiguous to the existing district;

(2) That it can be feasibly administered by the managers of the existing district;

(3) The reasons why it would be conducive to the public health and welfare to add the area to the existing district;

(4) A map of the affected area;

(5) The name of the enlarged district, if other than that of the existing district; and

(6) A request for the addition of the proposed territory.

The petition shall be served and the board shall proceed in a manner as prescribed for a nominating petition. The requirement of notice, and public hearings shall be as prescribed for the nominating petition.

Subd. 2. Upon the hearing, if it appears to the board that the enlargement of the district as prayed for in the petition would be for the public welfare and public interest and the purpose of Minnesota Statutes, Chapter 112, would be served, it shall, by its findings and order, enlarge the district and file a certified copy of said findings and order with the secretary of state. The name of the district may be changed by order of the board if requested in the petition to enlarge the district.

Subd. 3. If the district, as enlarged, affects more than one county, distribution of the managers among the counties affected shall be as directed by the board in the order enlarging the district.

112.78 FAULTY NOTICES, EFFECT. In any case where a notice is provided for in this chapter for any hearing or proceeding before the board, managers, or district court, if the board of managers or court finds that due notice was not given, it does not thereby lose jurisdiction, and the proceedings are not thereby invalid, but the board, managers, or court, in such case, shall order notice to be given and continue the hearing until such time as such notice shall be properly given, and thereupon shall proceed as though notice had been properly given in the first instance. In case the original notice was faulty only with reference to publication as to certain tracts, only the persons interested in those particular tracts need be notified by a subsequent notice. If the publication of any notice in any county was defective or not made in

time, notice need be given only within the county in which notice was defective.

112.79 HEARINGS, CONTINUANCES. Whenever an order has been made and notice given for a hearing in any proceeding under this chapter, and the board or managers or court fail to appear at the time and place specified, the secretary of the board or managers or the clerk of the district court shall continue the hearing to such other date as is deemed necessary and notify the board or managers or the court of the continuance and the date of hearing. The matter shall be continued to the date fixed by the secretary of the board or any manager, or the clerk of court, without affecting the jurisdiction of the board or managers, or the court.

112.791 REVIEW BY BOARD. Any person or public corporation aggrieved by an order of the managers authorizing or refusing to establish any project and improvement in whole or in part may have such order reviewed by the board by serving a copy of a demand for such review upon the managers within 30 days after the filing of such order. Such demand shall state the grounds upon which such review is sought, and the original demand with proof of service attached shall be forthwith filed with the board. The board may provide by rule that a reasonable cost bond shall be required as a condition to a public hearing on any review to the end that as far as practicable appeals will have substantial merit. Thereupon the board shall consider said matter and may hold a public hearing in the manner provided therein upon a nominating petition. The board shall thereafter make an order amending, modifying, approving, or rejecting the order of the managers and remand the matter to the managers with directions to proceed in accord with the order of the board.

112.792 APPEALS FROM DECISION OF BOARD. Subdivision 1. Any person or public corporation aggrieved by any final order, rule, regulations, or final decision of the board may

have the same reviewed by certiorari proceedings in the district court in the county in which a part of the district is located. The court of its own motion, or on application of any party, may, in its discretion, take additional testimony on any issue of fact, but no jury trial shall be had. If the court shall determine that the action of the board involved is lawful and reasonable and is warranted by the evidence in case an issue of fact is involved, the action of the board shall be approved; otherwise the court may vacate or suspend the action of the board involved, in whole or in part, as the case may require, and thereupon the matter shall be remanded to the board for further action in conformity with the decision of the court. The provision for review by certiorari, as herein provided, is not exclusive, and judicial action by mandamus, injunction, or other judicial remedy may be resorted to.

To render a review effectual, the aggrieved person or public corporation shall file with the clerk of the district court of the county wherein the principal place of business of the district is located, within 30 days of the date of such final order, rule, regulation, or decision an application for review together with the grounds upon which the review is sought.

Subd. 2. In any certiorari proceeding, or other judicial proceeding involving any order, rule, regulation, or other decision of the board, the action of the board shall be prima facie reasonable and valid, and it shall be presumed that all requirements of the law pertaining thereto have been complied with. All findings of fact made by the board shall be prima facie evidence of the matter therein stated. The burden of proving the contrary shall rest upon the party questioning the action of the board.

112.80. APPEALS TO DISTRICT COURT. Subdivision 1. An appeal may be had to the district court by any party aggrieved by an order of the managers made in any proceeding

and entered upon its record determining any of the following matters:

(1) The amount of benefits determined;

(2) The amount of damages allowed;

(3) Relative to the allowance of fees or expenses in any proceeding, or

(4) Which affects a substantial right.

Subd. 2. In all cases of appeal, the amount awarded by the jury as finally determined shall stand for and in the place of the amount from which the appeal was taken.

Subd. 3. If an appeal is taken from an order authorizing an improvement, the trial of any appeals from benefits or damages in such proceedings shall be stayed pending the determination of such appeal. If the order authorizing be affirmed, any such appeal from benefits or damages shall then stand for trial as provided by this section. If such appeal be from an order refusing to authorize an improvement, and if the court thereafter orders the improvement the secretary of the district shall give notice by publication of the filing of the order. Such notice shall be sufficient if it refers to the proposed improvement by general description and recites the substance of the order and the date of filing in the court.

Subd. 4. Any person or public corporation appealing on the first or second ground named in subdivision 1, may include and have considered and determined benefits or damages affecting property other than his own. Notice of such appeal shall be served upon the owner or occupant of such other property or upon the attorney who represented such owner in the proceedings. Such notice of appeal shall be served upon the auditor of the county wherein the property is situate and upon the clerk of the district court of the county wherein the principal place of business of the district is located.

Subd. 5. To render the appeal effectual, the appellant shall file with such clerk of the district court within 30 days of the date of such final order a notice of appeal which shall state the grounds upon which the appeal is taken. The notice of appeal shall be accompanied by an appeal bond to the district where the property is situate of not less than $250 to be approved by the clerk of district court, conditioned that the appellant will duly prosecute the appeal and pay all costs and disbursements which may be adjudged against him and abide the order of the court.

Subd. 6. The issues raised by the appeal shall stand for trial by a jury and shall be tried and determined at the next term of the district court held within the county in which the notice of appeal was filed, or in such other counties in which the appeal shall be heard, beginning after the filing of the appeal; and shall take precedence over all other court matters of a civil nature. If there is more than one appeal triable in one county, the court may, on its own motion or upon the motion of a party in interest, consolidate two or more appeals and try them together, but the rights of the appellants shall be separately determined. If the appellant fails to prevail, the cost of the trial shall be paid by the appellant. In case of appeal as to damages or benefits to property situate in the county other than the county where the principal place of business of the district is located, and if the appellant so requests, the trial shall be held at the next term of the district court of the county wherein the lands are situated. In such case, the clerk of the district court where the appeal is filed, shall make, certify and file in the office of the clerk of district court of the county where the trial is to be had, a transcript of the papers and documents on file in his office in the proceeding so far as they pertain to the matter on account of which the appeal is taken. After the final determination of such appeal, the clerk of the district court

where the action is tried, shall certify and return the verdict to the district court of the county where the proceedings were instituted.

Subd. 7. The clerk of the district court shall file a certified copy of the final determination of any such appeal with the auditor of the county affected and with the secretary of the board of managers.

Subd. 8. An appeal taken from an order of the managers authorizing or refusing to establish a project and improvement in whole or in part shall be reviewed by the water resources board as authorized by section 112.791, before an appeal may be taken to the district court.

112.82 AGGRIEVED PARTIES, RIGHTS. Subdivision 1. Any party aggrieved by a final order or judgment rendered on appeal to the district court or by the original order of the court made in any proceedings heard and tried before the court as in this chapter provided, may appeal therefrom to the supreme court in the manner provided in civil actions. Such appeal shall be made and perfected within 30 days after the filing of the order or entry of judgment. The notice of appeal shall be served on the clerk of the district court and need not be served on any other person.

Subd. 2. In any proceeding before the managers for the repair, improvement, maintenance, consolidation, or abandonment of any of the works of the district the same right of appeal to the district or supreme court shall be had as from a similar order made in a proceeding to establish the improvement as herein provided and upon like grounds and with similar procedure.

112.84 DUE PROCESS OF LAW. No person shall, under this chapter, be deprived or divested of any previously established beneficial uses or rights without due process of law.

112.85 WITHDRAWAL OF TERRITORY. Subdivision 1. Proceedings to withdraw any territory from an existing district

shall be initiated by a petition filed with the secretary of the board. The required signatures on a petition for withdrawal shall be the same as prescribed for a nominating petition, provided, however, the percentages shall be calculated only with reference to the territory which is proposed to be withdrawn from the district. Such petition shall state that the territory so described has not received or will not receive any benefits from the operation of the district, that the district can perform the functions for which it was established without the inclusion of said territory and that said territory is not, in fact, a part of the watershed. The petition shall request the release of the described territory from the district.

The petition shall be served and the board shall proceed in a manner as prescribed for a nominating petition. The requirements for notices and public hearings shall be as prescribed for the nominating petition.

Subd. 2. Upon the hearing if it appears to the board that the territory as described in the petition has been not and will not receive any benefit from the operation of the district and that the district can perform the functions for which it was established without the inclusion of said territory, and that said territory is not, in fact, a part of the watershed, the board may issue an order releasing the territory, or any part of said territory, as described in the petition. No lands shall be released which have been determined subject to any benefits or damages for any improvement previously constructed. The territory so released shall remain liable for its proportionate share of any indebtedness existing at the time of the order. Levies on the lands shall continue in force until fully paid. If the board shall determine that the order prescribing the distribution of managers should be amended following the withdrawal of any territory it may so direct in the order authorizing the withdrawal.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 512

JOSEPH A. ADELMAN and JOSEPH W. KENNEALY, individually and as representative of all persons in Dakota County, Minnesota owning land in the Lower Minnesota River Watershed District,

Appellants,

vs.

THE LOWER MINNESOTA RIVER WATERSHED DISTRICT,

Appellee.

APPELLANTS' REPLY TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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APPELLANTS' REPLY TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

Statement

Appellee in its statement makes considerable reference to the notices given by the Watershed District of its various proceedings. Any facts relating to notices given or received are wholly immaterial to the basic question as to this Court's

jurisdiction and the issues to be determined on this appeal. Also we point out that two of the land owners who were involved as plaintiffs in this action testified at the trial that they received no *actual* notice of any hearings and there was no proof of service of any notice on them. (R. p. 271, f. 1 - Exhibits 4, 5, 6, 7 and 32) (R. p. 213, f. 2 - p. 215, ff. 1, 2 - Exhibits 4, 5, 6, 7 and 32). Therefore, these two land owners who are plaintiffs are in a position to raise the constitutional questions herein irrespective of any notices given or received by any other plaintiffs. The immateriality of the notice question is further elaborated upon later in this reply.

We call to this Court's attention that the decision and memorandum attached to appellee's Motion to dismiss (page 34 et. ff.) as appendix "B" is a decision on a temporary restraining order only and is in no way involved in this case. The said decision and memorandum (dated November 1, 1963) so attached was, in fact, vacated and withdrawn by the trial judge and a new decision substituted dated November 26, 1963, without any memorandum. (See Exhibit 94 on file with this Court.) The November 1, 1963 opinion is also printed on page 435 of the Record in the Minnesota Supreme Court. That appellee's actions in this regard were wholly unjustified is made more apparent by the fact that that case involved different parties, different issues, different attorneys and is, in fact, still pending in the trial court. Therefore, any such decision is fully immaterial and irrelevant as to any of the issues in this case.

It is also to be noted, lest there be any confusion, that in the last full paragraph on page 5 of Appellee's Motion the date is incorrectly stated to be October 10, 1962. Appellant respectfully believes that such date should be October 10, 1963.

Jurisdiction

Appellee states that appellants failed to attach to its jurisdictional statement the opinion of the Minnesota Supreme Court and also failed to set out in full the Statute involved. Appellant interpreted said rules to mean that said opinion need not be attached to the jurisdictional statement if it had been reported. Said opinion had been reported at the time the jurisdictional statement was prepared and the correct citation thereof was duly included in the jurisdictional statement. In any event, appellee has seen fit to attach a full and complete copy of the opinion of the Minnesota Supreme Court to its motion; and, therefore, this objection should be moot. Rule 15 1(b) (V) requires only that the pertinent text of a lengthy statute need be set out in a jurisdictional statement. This was done. However, since appellee has set the statute out in full, this objection should likewise be moot.

The Judgment Appealed From Does Not Rest on an Independent or Adequate Non-Federal Basis and, in Any Event, Is Without Any Fair or Substantial Support

Appellees state that the appeal should be dismissed because the judgment appealed from "rests on an adequate Non-Federal basis" because the Minnesota Supreme Court reversed the Dakota County District Court upon the grounds that appellants had an adequate legal remedy.

We first note that appellee does not contend that the alleged Non-Federal basis of the decision was "independent" as well as adequate as is required. Appellant respectfully submits that the alleged Non-Federal basis of the decision relied

upon by the appellee is neither independent nor adequate and is without fair or substantial support. The basic test of the Non-Federal basis rule is whether or not the decision appealed from could remain the same if this Court would hold in favor of appellant on the Federal Constitution issue. *Herb v. Pitcairn*, 324 U.S. 117 (1944). We submit that the decision of the Minnesota Supreme Court could, in no event, be the same if the Federal Due Process issue is decided in favor of appellant. If it is held that the Watershed District does not have the Federal Constitutional power to levy special assessments on abutting or non-abutting land for a project *solely* to improve navigation, such a holding would necessarily be final and decisive and render unnecessary an inquiry into any other issues. The simple effect of such a holding would be that the project could proceed if the Watershed District or Federal Government could find proper sources of money other than the unconstitutional special assessment on plaintiffs' abutting and non-abutting property. See *Norton v. Shelby County*, 118 U.S. 425 (1886); *City of Saint Paul v. Dalsin*, 71 N.W. 2d 855; *State v. One Oldsmobile Two-Door Sedan*, 35 N.W. 2d 525; *Risty v. Chicago, R. I. & Pac. Ry. Co.*, 270 U.S. 378 (1925).

Furthermore, appellants in this case are threatened with serious and immediate injury by the taking of their property without due process of law; if appellee would have its way, appellants would be deprived of their right to contest this Federal Constitutional question. *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938). So far as the jurisdiction of this Court is concerned, the plaintiffs here would be in the same position as the plaintiff in the case of *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), had jurisdiction been there denied; see also *Brinkerhoff-Faris Trust and Savings*

Co. v. Hill, 281 U.S. 673 (1930); *Williams v. Georgia*, 349 U.S. 375 (1955); *Stout v. City of Baxley*, 355 U.S. 313 (1958); *Ancient Egyptian Order v. Michaux*, 279 U.S. 737 (1929); *Minnesota v. National Tea Co.*, 309 U.S. 551 (1940); *Ward v. Love County*, 253 U.S. 17; 64 L. ed. 751; 4 U.S. Ct. 419 (1920).

Appellee points to the fact that some plaintiffs did receive actual notice of the various hearings held by the Watershed District for the establishment of the project and the approval of the appraisers' report and that a few plaintiffs did, in fact, appeal from the assessment levy to the District Court of Dakota County, which appeals are still pending. However, we call to the attention of this Court that the final hearing on the appraisers' report for the levying of the special assessments was the only hearing for which the Watershed Act required mailed notice. All prior decisions of the Watershed District for the approval of the project or even the creation of the District were made either on no notice to the land owners or by published notice only. The record is also uncontroverted that at least two land owners who testified received no actual notice of any hearing, supra. The fact that a few land owners who were plaintiffs did appeal from the order levying the assessment is of no importance and, in any event, the right to such appeal is inadequate because M.S.A. 112.80 states that said appeals may only be made from an order of the Managers determining any of the following matters:

"1. The amount of benefits determined.
2. The amount of damages allowed.
3. Relative to the allowance of fees or expenses in any proceeding; or
4. Which affects a substantial right."

Since the final assessment order determined solely the amount of benefits, only the question as to the amount of the assessment could be raised on such appeal.

The Minnesota Supreme Court in a case decided shortly prior to the instant case clearly held that injunction was a proper remedy in special assessment cases, if the land owner acted at least before the work was completed. See *Larson v. Freeborne County*, 126 N.W. 2d 771 (1964). In the instant case *no* work on the assessment project had been commenced prior to the commencement of this action and no contract therefore had even been made or entered into. It is clear that injunction was not only the proper remedy in this case, but the only one which could afford adequate relief. Had appellants taken any other course, including the one provided in M.S.A. 278.01, there not only was serious doubt whether the constitutional question could be raised, but a multiplicity of suits could not have been avoided and undoubtedly the question would not have been decided before any work was commenced and large sums of money expended. The injunction remedy also has been held by this Court to be proper under circumstances almost identical to those in the instant case not only because the legal remedies are inadequate, but also to avoid multiplicity of suits (which factor is also present in the instant case). See *Risty v. Chicago, R. I. & Pac. Ry. Co.*, 270 U.S. 378 (1925), 70 L. ed. 642. Thus, it is submitted that the alleged Non-Federal basis relied on by appellee is neither independent or adequte and is without fair or substantial support.

A Substantial Question Is Involved

In its discussion on this point, appellee wholly failed to answer appellant's contention that a substantial federal question is involved. Appellee does not deny that the question involved on this appeal is one which has not been decided by this Court or any other Federal Court and is of the greatest importance for land owners on all navigable rivers in the United States as well as to all taxing districts on such navigable rivers.

State's Jurisdiction Over the Minnesota River

Appellee states that appellants' argument that the State of Minnesota has no power (the delegation of this power is immaterial) to levy special assessments against abutting and non-abutting land owners for a project, the sole purpose of which is to improve a navigable river for commercial purposes, can not be the basis of review by this Court—apparently, for the reason that Minnesota has concurrent jurisdiction over the Minnesota River.

Appellant points out that its argument in the jurisdictional statement herein *assumed* that Minnesota might have concurrent jurisdiction over navigable rivers within its borders.[1]

Besides other reasons given in the jurisdictional statement, the essential point in this connection is that neither the State of Minnesota or the Lower Minnesota Watershed

[1] The Minnesota River is admittedly navigable, even though its source and mouth lie entirely within the State, its waters flow into the Mississippi River and on to the Gulf of Mexico.

District has *exclusive* jurisdiction or control over the river so as to enable either of them to levy special assessments for the improvement here involved, when they can not fully control the use of that improvement.

Conclusion

Appellants respectfully submit that appellee's motion to dismiss or affirm should be denied and that jurisdiction of this appeal should be noted.

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